Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

RICHARD J. PACIULAN; WILLIAM A. KRUSE,

Petitioners,

versus

RONALD M. GEORGE, Chief Justice of the California Supreme Court; STANLEY MOSK; JOYCE L. KENNARD; MARVIN R. BAXTER; KATHRYN MICKLE WERDEGAR; JANICE R. WRONG; MING W. CHIN; JUDY JOHNSON; JEROME BRAUN,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented For Review

1. Is a State's *pro hac vice* admission rule, that categorically bars a licensed patent attorney and or other federal practice specialists, from applying for *pro hac vice admission*, on the basis of residence or citizenship, immune from constitutional review as the Ninth Circuit decision below holds?

2. Is an experienced attorney's opportunity for *pro hac vice* admission in the State court not constitutionally protected as the Ninth Circuit decision below holds?

Parties

Petitioners are Richard J. Paciulan and William A. Kruse.

The respondents are Ronald M. George, Chief Justice of the California Supreme Court, and Associate Justices Stanley Mosk, Joyce L. Kennard, Marvin R. Baxter, Kathryn Mickle Werdegar, Janice R. Brown, Ming W. Chin. The intervening respondents are State Bar of California officers Judy Johnson and Jerome Braun.

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Opinions Below

The United States Court of Appeals for the Ninth Circuit decision is reported at ___ F.3d ___ (2000) and is set forth in the Appendix. The United States District Court for the Northern District of California decision entering a Rule 12(b)(6) dismissal and denying petitioners' Motion for Summary Judgment is reported at 38 F.Supp.2d 1128 (N.D.Cal 1999) and is set forth in the Appendix.

Statement of Supreme Court Jurisdiction

The statutory provision for this Court's jurisdiction is 28 U.S.C. § 1254. The Ninth Circuit decision to be reviewed was filed October 17, 2000.

Relevant Statutory/Constitutional Provisions Involved

See Appendix.

Statement of the Case

Petitioners Richard J. Paciulan, Esq. and William A. Kruse, Esq. are sister-state attorneys in good standing. They argue Rule 983 is facially overbroad and as applied to them. The court found standing.

Richard A. Paciulan is an electrical engineer, member in good standing of the Massachusetts bar, and a patent attorney admitted to practice for over 20 years before the United States Patent and Trademark Office. He is a Boston native hired by a mid-sized California law firm a few years ago after it conducted a nationwide search. His associates and clients know well his competence. Ninety-eight percent of his patent and intellectual property practice is federal. The rare

state law issue he tackles is usually multi-state. He is married with three children in college. He works 50-60 hours a week. He does not have the ability to take off from work and study for the California bar exam because of his inviolate family obligations and practice stress. Moreover, patent law is **not** tested on the California bar exam. To be fully candid, after being a lawyer for 23 years, he also does not aspire to chant hackneyed general legal axioms to a bar exam grader, who just recently learned the alphabet, and he himself has never represented a client or seen the inside of a courtroom.

William A. Kruse is a federal tax specialist, CPA, and a member in good standing of the Colorado bar. Kruse was an assistant vice-president, tax research and planning, for almost 20 years at AMDFAC Inc. His job was to negotiate federal and state tax disputes for AMFAC's 40 corporations throughout the United States. He was transferred to California as a result of his employment. Kruse's area of practice is also not even remotely tested on the California bar exam.

The Ninth Circuit drastically overstates the petitioners' challenge. The petitioners in this case challenge only parts of California Rule of Court 983 (a) subparagraphs (1-3). The petitioners' challenge is exclusively limited to the following clauses:

> No person is eligible to appear as counsel pro hac vice pursuant to this rule if (1) he is a resident of the State of California, or (2) he is regularly employed in the State of California, or (3) he is regularly engaged in substantial business, professional, or other activities in the State of California.

The petitioners do **not** now and they have never challenged that part of subparagraph (a) that provides, "Absent special circumstances, repeated appearances by any person pursuant to this rule shall be a cause for denial of an

application." The petitioners do **not** now and they have never challenged subparagraph (b), which concerns dual application to the Court and to the State Bar of California; or subparagraph (c) that requires a fee to defray expenses to implement the Rule; or subparagraph (d) that requires the attorney to familiarize himself with the local rules and authorizes State of California ethical jurisdiction; or paragraph (e) that is not relevant.

In other words, the petitioners never claimed a law license in one State enabled any attorney to practice in another State without restriction. The petitioners' argument was limited to the challenged Rule's stripping the judge of discretion to consider and grant a *pro hac vice* application, categorically, without any hearing opportunity and regardless of individual merit or good cause, on the basis of California residence or citizenship.

Consistent with the Ninth Circuit exaggerated depiction as to the issue presented, the Court also plays fast and loose with the facts. The material facts omitted coincide and support petitioners' arguments that California Rule 983 constitutes pure "speaker discrimination," a form of "content discrimination." *See United States v. Playboy Entertainment Group, Inc.*, 529 U.S. ___, ____ (2000) ("Laws designed or intended to suppress or restrict specific speakers contradict basic First Amendment principles," they are speaker discrimination, a form of content discrimination.)

Contrary to the decision's bare-naked factual account, the State of California does **not** treat all American or California citizens the same. The omitted facts that establish Rule 983 is "speaker discrimination," a form of "content discrimination" include:

1. The State of California has other *pro hac vice* admission rules that do **not** discriminate on the basis of residence or citizenship. California Rule of Court 983.2(d)(3)-(4) grants certified law students the privilege to appear *pro hac vice*, and does **not** discriminate on the basis of residence. *See* App. p. 70-71. California Rule of Court 76.6(f)

authorizes *pro hac vice* admission in capital cases, and does not discriminate on the basis of residence or citizenship. *See* App. p. 63-65.

2. California Rule of Court 988 (*See* App. p. 72-76) authorizes foreign country attorneys to register with the State Bar and practice foreign law: Yet Rule 983 debars sister-state attorneys from practicing federal law, or the law of another state, *pro hac vice* in the State court, automatically, without any hearing. This disparate treatment of foreign country attorneys is important because the legal issue is not whether Rule 983 is rational. The legal issue is whether Rule 983 constitutes "speaker discrimination."

3. The decision below makes it appear the petitioners are doing something unspeakable for wanting to associate with their California counterparts and petition the Court *pro hac vice*. However, State Bar defendant Jerome Braun voluntarily intervened in this proceeding, claiming that his intervention was necessary because he was the executive in charge of admissions. Braun is not a member of the California State Bar. Braun is a member of the Ohio Bar.

4. California Rule of Professional Conduct 1-100(B) & (D) authorizes sister-state attorneys to work in California along with California licensed attorneys, share profits, and it provides ethical jurisdiction over all sister-state attorneys in the State. *See* App. 76-78. Sister-state attorneys are thus afforded comity for transaction work in California, but at the same time, they are denied the equal right to associate and petition *pro hac vice* in conjunction with their state counterpart in the State court.

5. The State of California recently passed Senate Bill 1782. *See* App. p. 50-52. This law states, "It is the intent of the Legislature that the Supreme Court of California should adopt rules permitting the admission to the practice of law in California of an attorney who is licensed in another state and who has not passed the California State Bar examination, if the state in which the attorney is licensed to practice affords the same opportunity to licensed attorneys from California."

The Legislature has expressly declared it wants general bar admission sister-state attorney reciprocity implemented. This Bill further authorizes the California Supreme Court to appoint a task force to study the general admission reciprocity issue and to implement it via court rules. This Senate Bill was enacted into law before the Ninth Circuit decision was filed. The Court was made aware of this new law calling for attorney reciprocity before oral argument and in oral argument. This law illustrates there is no compelling or substantial California justification to discriminate in *pro hac vice* admission on the basis of residence. The sponsors of the law further in correspondence addressed to defendant Chief Justice George expressly stated, "we are of the belief that the California Bar Exam is not the best determination of a prospective attorney's ability to represent California consumers." *See* App. p. 79.

The Ninth Circuit asserts petitioners' counsel has unsuccessfully filed several cases challenging California attorney regulations. As if the message should be disregarded because of the messenger. The Court does not disclose that incontrovertible evidence was presented that establishes petitioners' counsel, and this case *Paciulan v. George*, galvanized sponsorship and the subsequent enactment of Senate Bill 1782.

The decision further declares the petitioners are attempting to elide the State Bar's requirements. This is false. Petitioner Paciulan is a patent attorney. He doesn't need to be a member of the California bar. *Sperry v. Florida*, *infra*. Under the California Rules of Professional Conduct, he is authorized to associate as an attorney in California with his colleagues. Petitioner Paciulan will also not qualify for general admission reciprocity when it is implemented because Massachusetts does not provide *quid pro quo* reciprocity.

As noted above, the petitioners' challenge is limited to the citizenship and residency discrimination. This is the aspect that injures the petitioners. They also argue Rule 983

is facially overbroad. They assert Rule 983 is pure "speaker discrimination" because it extends First Amendment advocacy, association, and petition rights *pro hac vice* to some out-of-state lawyers (including resident sister-state attorneys in capital cases), the State Bar's lawyer, and certified law students — and not to the petitioners categorically without a hearing. The challenged clauses are "intended and designed to restrict and suppress specific advocates" in a public forum. *Playboy*, *supra.* Out-of-state attorneys have a constitutionally protected duty and obligation to vindicate federal rights and champion locally unpopular claims. *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 281 (1985).

Rule 983 in effect is censorship. It encourages and contributes to the violation of federal rights. Sister-state attorneys, who function as a constitutional "check and balance" are gagged. Only California admitted attorneys who, often have a vested interest in local affairs, as Rule 983 demonstrates, are permitted to petition the State Courts for redress of federal grievances. In a word, the Ninth Circuit has piayed a "3 Card Monty" subterfuge by distorting the issue and concealing material facts.

The Ninth Circuit, in this published precedent, then holds that the State of California[1] has "exclusive power" and "sole discretion" to regulate **all** attorneys, and its regulations are immune from constitutional review. The Court goes onto declare that *pro hac vice* admission is not constitutionally protected. The decision relies entirely on dicta in *Leis v. Flynt*, *infra*, a decision, the petitioners will argue is factually inapplicable and has been overruled *sub silentio*.

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[1] California is virtually the only State in the Union that has non-A.B.A. accredited law schools. Each year hundreds of non-A.B.A. accredited students become California lawyers.

Reasons The Court Should Grant The Writ

There are three reasons the Court should grant this petition. *First*, the holding that *pro hac vice* admission is not constitutionally protected cannot be reconciled with decisions in every United States Court of Appeals that uniformly hold that *pro hac vice* admission is constitutionally protected. Second, the Ninth Circuit holding that State's have "sole discretion" and "exclusive power" over **all** members of the bar within the State, including federal patent attorneys, usurps federal law. This holding cannot be reconciled with numerous decisions of this Court, and it effectively nullifies the Constitution. *Third*, this case in this information age presents First Amendment questions of exceptional importance, and this Court has recently granted certiorari in a case where similar issues are presented.

1. The Ninth Circuit Holding Conflicts With Decisions In Every Circuit That Uniformly Hold *Pro Hac Vice* Admission Is Constitutionally Protected

The Ninth Circuit primarily relies on dicta extracted from *Leis v. Flynt*, 489 U.S. 439 (1979) to reach its holding that *pro hac vice* admission is not constitutionally protected. There, Larry Flynt's out-of-state attorneys were denied *pro hac vice* admission in a criminal case. They did not argue or assert their own or their client's First or Sixth Amendment rights. They did not argue or assert the Privileges and Immunities Clauses. The limited issue they raised was whether the attorneys' rights to due process, under the 14th Amendment protected "liberty" and "property" interests, were violated under State law as it then existed. Ohio at that time didn't even have a *pro hac vice* rule. This Court, in 1979, in a 5-4 *per curiam* decision filed summarily without briefing reversed the Sixth Circuit and held *pro hac vice* admission was "purely discretionary."

Since *Leis*, "an evolution has occurred in determining what personal interests are protected by the Fourteenth Amendment." D. Keenan, *Out-of-State Practice of Law Multistate and Pro Hac* § 2-3 p. 12. The procedure for *pro hac vice* admission is now statutory in all jurisdictions but one: Idaho, by case law grants the right to appear *pro hac vice*. *Id.* at p. 13

Leis v. Flynt, narrow to start with because it was not presented or decided under the First Amendment, Sixth Amendment, or Privileges and Immunities Clauses, and, although never expressly overruled, has been superseded by authority of more recent vintage. Virtually every circuit has concluded *pro hac vice* admission is no longer "purely discretionary" — it is constitutionally based. A further negation arises as this Court has subsequently also squarely held it is unconstitutional to grant an official "unfettered discretion to deny a permit application." *City of Lakewood v. Plain Dealers Publishing Company* 486 U.S. 750, 108 S.Ct. 2138, 2152 (1988). Rule 983 is a textbook example of "unfettered discretion." A further clash arises as this Court has squarely held an attorney's opportunity to practice law is constitutionally protected.

The decision also presents a swarm of irreconcilable inter and intra circuit conflicts.

1. In the 6th Amendment context, every circuit has held *pro hac vice* admission is constitutionally protected. It has been repeatedly held that mechanical *pro hac vice* rules that leave no room for the exercise of discretion are unconstitutional. *United States v. Ries*, 100 F.3d 1469, 1471 (9th Cir. 1996) *cert. denied* 117 S.Ct. 2526 (1997); *Panzardi-Alvarez v. United States*, 879 F.2d 975, 980 (1st Cir.1989)("[A] decision denying a *pro hac vice* admission necessarily implicates constitutional concerns.") *cert. denied*, 493 U.S. 1082 (1990); *U.S. v. Collins*, 920 F.2d 619, 626 (10th Cir. 1990)("Mechanistic application of [pro hac vice] rules limiting such appearances is improper.") *cert. denied* 500 U.S. 920. *See U.S. v. Childress*, 58 F.3d 693, 736

(D.C.Cir. 1995)("The deprivation of his counsel of choice would entitle [petitioner] to a reversal of his conviction as a matter of constitutional right.") Rule 983 is a facially overbroad mechanical rule that leaves no room for discretion.

2. In the civil context, other circuits have held *pro hac vice* admission is constitutionally protected, and that only a showing of unethical conduct that justifies disbarment will justify denial of *pro hac vice* admission. *See Schlumberger Technologies, Inc. v. Wiley*, 113 F.3d 1553 (11th Cir. 1997)(held that binding circuit precedent requires a showing of unethical conduct of such a nature as to justify disbarment of a lawyer admitted generally to the bar of the district court in order to justify the denial of an applicant's *pro hac vice* admission.) This Ninth Circuit decision is diametrically opposed to what other circuits have concluded is the required necessary showing to deny *pro hac vice* admission.

3. The decision appealed also conflicts with the California Supreme Court's precedent. In *NBC Subsidiary (KNBC) Inc. v. Superior Court of Los Angeles*, 20 Cal.4th 1178 (1999), the California Supreme Court unanimously held that under the First Amendment, courtroom proceedings in civil cases are presumptively open to the public and the media; and that courtrooms cannot be closed absent a compelling need, and specific procedural guidelines are required including prior notice and an opportunity to be heard. Out-of-state attorneys serve a constitutional check and balance function similar to that of the media. Out-of-state attorneys are also members of the public. If the courtroom cannot be closed to the press and public absent a compelling need, and without pre-deprivation due process rights including notice and the opportunity to be heard, it follows the courtroom cannot be closed to sister-state attorneys, without a compelling need, and pre-deprivation due process that includes notice and an opportunity to be heard.

This Court should grant review and answer the question whether *pro hac vice* admission is constitutionally protected.

2. The Ninth Circuit Holding That California Has Sole Discretion To Regulate All Attorneys In The State, And Its Regulations Are Immune From Constitutional Oversight, Conflicts With Decisions Of This Court And Effectively Nullifies The Constitution

Contrary to the Ninth Circuit decision, this Court has explicitly recognized that the First Amendment liberties apply to lawyers and to the associations they belong. In *Mine Workers v Illinois Bar Assn.*, 389 US 217, 222 (1967), the Illinois State Bar Association filed a Complaint, the essence of which was that the union, by employing a licensed attorney on behalf of its members, constituted the unauthorized practice of law. The Illinois Supreme Court held this bar restriction did not violate the *Mine Workers'* constitutional rights of speech, assembly, and to petition for redress of grievances. This Court reversed.

This Honorable Court first recognized that the States have broad power to regulate the legal profession, but that laws which actually affect the exercise of vital First Amendment rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence. *Id.* at 222. "(B)road rules framed to protect the public and to preserve respect for the administration of justice can in their actual operation impair the value of associational freedom." *Ibid.* This Court held, "the rights to assemble peaceably to petition for redress of grievances are among the most precious of the liberties safeguarded by the Bill of Rights. These rights, moreover, are intimately connected both in origin and in purpose, with the other First Amendment rights of free speech and free press. 'All these, though not identical are inseparable.' (internal

cites omitted)." *Ibid.* "(T)he litigation in question is, of course, not bound up with political matters of acute social movement, as in *Button*, but the First Amendment does not protect speech and assembly only to the extent it can be characterized as political. 'Great secular causes, with small ones, are guarded. The grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones. And the rights of free speech and a free press are not confined to any field of human interest.'" *Id.* at 223. **The freedom of expression guaranteed against state interference by the Fourteenth Amendment includes the liberty of individuals to not only speak but also to unite to make their speech effective. The latter right encompasses the right to join together to obtain judicial redress.** *Id.* at 226. (emphasis added)

Thus, this Court overturned the Illinois decree that prevented the union members from associating with their choice of counsel, and the decree was also found to have violated the worker's rights to speech and to petition for redress of grievances.

The *Mine Worker's* factual scenario is almost identical to the First Amendment issues presented in this Petition for Certiorari. Petitioner Richard Paciulan is automatically and categorically barred from associating and petitioning *pro hac vice* on federal claims with his partners and associates in the California State courts.

This Ninth Circuit holding presents another conflict with this Court's decisions. In *Sperry v. Florida*, 373 U.S. 379 (1963), the petitioner, like Richard Paciulan, was registered to practice before the United States Patent and Trademark Office. Sperry had not been admitted to practice law in Florida. The State of Florida alleged he was engaged in the unauthorized practice of law because he maintained an office in Tampa, Florida. This Court reversed, and held petitioner as a member of the United States Patent and Trademark Office had a federal right to practice patent law in

Florida. In light of *Sperry*, petitioner has a federal right to practice his federal specialty in the State of California.

Rule 983, however, categorically, regardless of individual merit or good cause and without a hearing, infringes his association and petition rights as a patent attorney without any compelling reason. Richard Paciulan is not a "clear and present danger" that would justify this "prior restraint" imposed on his First Amendment freedoms. This Ninth Circuit decision does not examine petitioners' "prior restraint" argument and "speaker discrimination" claims, as it first finds the First Amendment is superfluous. According to this decision State law preempts federal law in California.

The decision also contradicts four decisions by this Court that squarely hold that an attorney's opportunity to practice law is a constitutionally protected "Privilege sand Immunity," and that discrimination in bar admission on the basis of residence or citizenship is unconstitutional because attorneys have a constitutional duty and obligation to vindicate federal rights and champion locally unpopular claims. *Supreme Court of New Hampshire v. Piper*, *supra*, 470 U.S. 274, 281 (1985).

The Ninth Circuit first states that Article IV. Sec. 2 Privileges and Immunities are distinguishable because the four cited Supreme Court cases involve discrimination in bar admission against out-of-state attorneys and citizens: And this case concerns discrimination in bar admission against in-state, sister-state attorneys. However, *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988) is a case almost directly on point that refutes this notion. There, the State of Virginia permitted qualified lawyers admitted to practice in another State to be admitted to the Virginia Bar "on motion," that is, without taking Virginia's bar examination. *Ibid.* Myrna Friedman, a Maryland resident who practiced and maintained her offices at her corporate employer's place of business in Virginia, applied for admission to the Virginia Bar on motion. The Virginia Supreme Court denied the application for failure to satisfy the residency requirement.

This Court reversed and held the Privileges and Immunities Clause is applicable anytime **"the State has burdened the right to practice law, a privilege protected by the Clause, by discriminating among otherwise equally qualified applicants solely on the basis of citizenship or residency."** *Id.* at 65-67 (emphasis added)

This Court in *Friedman*, JUSTICE KENNEDY writing, further made clear, that "while the Privileges and Immunities Clause cites the term 'Citizens,' for analytic purposes citizenship and residency are essentially interchangeable." *Id.* at 64 Rule 983 employs both of these impermissible proxies to discriminate. As in *Friedman*, Rule 983 "discriminates among otherwise equally qualified applicants solely on the basis of citizenship or residency," and it is thus unconstitutional. If discretionary general admission "on motion" is subject to Privileges and Immunities review, and the whole contains its parts, it follows discretionary *pro hac vice* admission on motion is subject to Privileges and Immunities review. Rule 983 is the reverse side of the same protectionist coin this Court struck down in *Friedman*.

Additionally, comity is the norm for constitutionally protected Privileges and Immunities. *Austin v. New Hampshire*, 402 U.S. 656 (1975). The decision fails to explain why it contradicts the norm of comity. The decision further fails to explain why out-of-state attorneys categorically, without any hearing, forfeit their constitutional duty and obligation to vindicate federal rights and champion locally unpopular claims, immediately and henceforth, on entering the State of California. California has a history of First Amendment violations against its own attorneys. In *Keller v. State Bar of California*, 496 U.S. 1, 13 (1990), this Court held in a unanimous decision the State Bar of California was a "labor union," and that it, had violated its members' First Amendment rights.

The Ninth Circuit then holds that the 14th Amendment Privileges and Immunities Clause is "essentially nugatory,"

"a cadaver," "technically superfluous," a "nonstarter." and "utterly incapable of performing any real work." This Ninth Circuit holding that the 14th Amendment Privileges and Immunities Clause is toothless — even if it were still true notwithstanding this Court's decision in *Saenz v. Roe*, 526 U.S. 489 (1999)(holding the 14th Amendment Privileges and Immunities Clause protects California residents) — is inapposite. First, if attorneys have Article IV Sec. 2 Privilege and Immunities, it follows that those exact same Privileges and Immunities are incorporated into the 14th Amendment Privileges and Immunities Clause. The Ninth Circuit fails to cite any case law for its holding that what has been held a constitutionally protected Privilege and Immunity under Article IV Sec. 2, is not also protected by the 14th Amendment Privileges and Immunities Clause. This Ninth Circuit incongruent reasoning is identical to its self-same holding that the First Amendment rights guaranteed by the First Amendment are **not** incorporated into the 14th Amendment. Second, the decision further — in light of the speaker discrimination facts that it suppresses — flies in the teeth of this Court's decision in *Saenz v. Roe*, 526 U.S. 489 (1999). Rule 983 does not treat all California and American residents and citizens equally. California based law students, the State Bar's own executive officer and attorney, and attorneys in capital cases are not categorically discriminated against because they live or work in California. Just as welfare recipients were treated unequally in *Saenz*, Rule 983 treats the petitioners unequally.

Moreover, petitioners submit this Ninth Circuit holding that the Due Process Clause is not implicated when out-of-state attorneys are denied the right to *pro hac vice* admission categorically without a hearing is absurd. The First Amendment "liberties" are obviously incorporated and enumerated in the 14th Amendment. Thus, Due Process requires a notice and an opportunity to be heard.

Likewise, if a licensed attorney's opportunity to practice law is a constitutionally protected Privilege and

Immunity because an attorney has a constitutional duty and obligation to vindicate federal rights and champion locally unpopular claims, it follows that the deprivation of that Privilege and Immunity first requires Due Process, including notice and an opportunity to be heard. Many courts have expressly held that the First Amendment rights are constitutionally protected Privileges and Immunities.

Furthermore, contrary to the Ninth circuit decision, States do not have "sole discretion" and "exclusive power" to regulate access to its courts. In *Powell v. Alabama*, 287 U.S. 45 (1932), this Court held the right of the accused in a State capital case to have the aid of counsel for his defense is guaranteed by the Due Process clause of the Fourteenth Amendment. In *Gideon v. Wainwright*, 372 U.S. 335 (1963), this Court held the right of an indigent defendant in a State criminal trial to have the assistance of counsel is a fundamental right essential to a fair trial, and petitioner's trial and conviction without the assistance of counsel violated the Fourteenth Amendment. In *Argersinger v. Hamlin*, 407 U.S. 25 (1972) this Court held the Supreme Court of Florida erred in holding an indigent who was tried for an offense punishable by imprisonment up to six months, a $1,000 fine, or both, and given a 90-day jail sentence, had no right to court-appointed counsel, on the ground that the right extends only to trials for non-petty offenses punishable by more than six months imprisonment. These cases illustrate the State does not have "sole discretion" and an "exclusive power" to control access to its Courts as the Ninth Circuit holds. The Sixth Amendment is not the only right incorporated into the 14th Amendment. The 14th Amendment also safeguards the First Amendment, Privileges and Immunities, Due Process, and Equal Protection Clauses (i.e. speaker discrimination).

This Ninth Circuit judgment holds accomplished men and women who went to A.B.A. accredited law schools, and have devoted and invested their heart and soul to the legal profession, and have been received into that ancient

fellowship for something more than private gain — **do not have constitutional rights.**

In *Dred Scott v. Sandford* 60 U.S. (19 Howard) 393 (1856) it was held the "Privileges and Immunities" guaranteed to all citizens of the United States do not apply to Negroes. Accordingly, Dred Scott, who was born a Negro slave, was not permitted the "Privilege and Immunity" under the Constitution to sue in the courts of Missouri. This Ninth Circuit decision affords sister-state attorneys the same constitutional rights as Dred Scott. That is none. This decision effectively nullifies the Constitution. This ignoble decision is virtually identical to the State of South Carolina's nullification ordinance passed in President Andrew Jackson's administration declaring that it did not have to follow federal law.

This decision, like a contagious disease, if not checked now by this Honorable Court is guaranteed to spread its poisons elsewhere.

3. The First Amendment Issues Presented Are of Exceptional Importance, And This Court Has Already Granted Certiorari On A Similar Case

The re-surge in the American economy has been fueled in large part by the development of intellectual property and cutting edge technology. American citizens and lawyers are equipped with lap top computers, cell phones, and the internet with its world wide access to the information highway. Yesteryear's slogan was "Have Gun Will Travel." Today's adage is "Have Lap Top & Cell Phone Will Travel."

The issue presented reaches far beyond the confines of California Rule of Court 983. Three out of the four United States District Courts fixed in California have *pro hac vice* admission rules that parallel Rule 983. Twelve or thirteen other Federal District Courts parallel Rule 983.

The question presented further raises an exceptionally important question of federal law. The challenged *pro hac*

vice rule is repugnant to the underpinnings of our Constitution. One of our Founding Fathers' grievances with King George III impelling the First Continental Congress (September 1774) and underlying the Declaration of Independence was his law making it unlawful for the colonists to associate with each other.[2] King George III outlawed the colonists from exercising the liberties that were birthed into the First Amendment. This is the corresponding advocacy, association, and petition grievance the petitioners have with California's Chief Justice George. Chief Justice George's Rule 983 denies American citizens the right to advocate, associate, and petition *pro hac vice* together. If Founding Father preeminent lawyers Patrick Henry or Thomas Jefferson were alive today, and they moved to California, they would be automatically barred from *pro hac vice* admission. No one can doubt that such a result is incongruent with the founding principles they espoused.[3] Principles that they felt so strongly about that they were willing to face death, and an eight year Revolutionary War with the then most powerful country in the world to implement.

Petitioners also submit review is warranted as this Court on September 26, 2000 granted certiorari in *Murphy v. Shaw*, Doc. 99-1613, a Ninth Circuit decision that raises parallel First Amendment issues. *Paciulan v. George* presents an enormous divergence as licensed lawyers were held not to have First Amendment rights. By contrast, the Ninth Circuit in *Murphy v. Shaw* held a prison inmate law clerk's First Amendment rights in associating with another prisoner were

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[2] *See* William Wirt, *Sketches of The Life And Character of Patrick Henry* (1848) p. 122, citing English law "declaring it treason for the inhabitants [colonists] to ... assemble themselves to consider of their grievances, and form associations for their common conduct."

[3] *Ibid.* at 133, quoting Patrick Henry at Virginia Convention, March 23, 1775, "Forbid it almighty God ! I know not course others may take; but as for me give me liberty or give me death."

violated, even under the deferential standard applicable to prisoners. The Ninth Circuit's decision here contradicts its decision in *Murphy v. Shaw.*

This Court must grant review, because if it affirms *Murphy v. Shaw*, jailhouse lawyers have greater First Amendment rights than licensed sister-state attorneys in good standing. This Court should also grant review because if it reverses *Murphy v. Shaw,* jailhouse lawyers have equal First Amendment rights to licensed sister-state attorneys. This is un-American. It is well settled law that prisoners because of their incarceration have diminished First Amendment rights.

To sum up, then, petitioners assert that it is appropriate for this Court to grant review because of the exceptionally important First Amendment issues presented, and because the Court has granted certiorari on a case that presents related issues.

Conclusion

For the foregoing reasons this Court should grant a writ of certiorari.

Dated: November 8, 2000

Respectfully submitted,

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(Any footnotes trail end of each document)

No. 99-15687

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD J. PACIULAN; WILLIAM A. KRUSE,
Plaintiffs-Appellants,

v.

RONALD M. GEORGE, Chief Justice of the California Supreme Court; STANLEY MOSK; JOYCE L. KENNARD; MARVIN R. BAXTER; KATHRYN MICKLE WERDEGAR; JANICE R. WRONG; MING W. CHIN; JUDY JOHNSON; JEROME BRAUN,
Defendants-Appellees.

September 14, 2000, Argued and Submitted, San Francisco, California

October 17, 2000, Filed

PRIOR HISTORY:
Appeal from the United States District Court for the Northern District of California. D.C. No. CV-98-01201-SI. Susan Illston, District Judge, Presiding.

DISPOSITION:
AFFIRMED.

COUNSEL:
Joseph R. Giannini, Los Angeles, California, for the plaintiffs-appellants.

Peter K. Southworth, Sacramento, California, Colin P. Wong, San Francisco, California, for the defendants-appellees.

JUDGES:

Before: Ruggero J. Aldisert, * Susan P. Graber and Raymond C. Fisher, Circuit Judges.

OPINION:

PER CURIAM:

Appellants Richard J. Paciulan and William A. Kruse sued defendants, Justices of the California Supreme Court and individuals from the State Bar of California, challenging the constitutionality of California's rules regulating pro hac vice admission to practice in California courts, as codified in California Rule of Court 983 ("Rule 983").[1] The district court, in a well-reasoned and comprehensive opinion, dismissed their complaint and enjoined Appellants' attorney, Joseph R. Giannini, from filing future suits in the United States District Court for the Northern District of California regarding admission to the California State Bar and the regulation of the practice of law in California without first obtaining leave from the Chief Judge of the court. *See Paciulan v. George, 38 F. Supp. 2d 1128, 1130, 1147 (N.D. Cal. 1999).* We agree with the district court and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant Paciulan has been a member of the Massachusetts bar since 1977. Appellant Kruse has been a member of the Colorado bar since 1953. Paciulan has a patent law practice, and Kruse is a tax law specialist. Both are California residents, but are not members of the California bar.

Appellants are represented by Joseph Giannini, who has an extensive history of mounting challenges to the

admissions requirements of the State Bar of California. In at least six other cases filed since 1987, Giannini has challenged bar admissions procedures on behalf of himself and others on a variety of grounds, including the claims raised in this litigation, the Supremacy Clause, the Commerce Clause, Title VII, the Fifth Amendment right to property and right to travel and the Full Faith and Credit Clause. *See McKenzie v. Rehnquist, 1999 U.S. App. LEXIS 32802, 1999 WL 1215630* (D.C. Cir. Nov. 22, 1999); *Morissette v. Yu, 1994 U.S. App. LEXIS 7992,* No. 93-56288 (9th Cir. Mar. 8, 1994); *Giannini v. Real, 911 F.2d 354 (9th Cir. 1990); Giannini v. Committee of Bar Exam'rs, 847 F.2d 1434 (9th Cir. 1988); McKenzie v. Wilson,* No. C 98-0580 SI (N.D. Cal. Feb. 12, 1998); *McKenzie v. George,* No. C 97-0403 SI (N.D. Cal. July 22, 1997); *see generally Paciulan, 38 F. Supp. 2d at 1130-34.* Each of these challenges was unsuccessful.

Plaintiffs filed suit March 25, 1998 challenging Rule 983, arguing that allowing nonresident attorneys pro hac vice status while denying it to California residents violates their rights under the Privileges and Immunities Clause of Article IV, the Privileges or Immunities Clause of the Fourteenth Amendment, the First Amendment and the Due Process Clause of the Fourteenth Amendment.[2] On March 9, 1999, the district court granted defendants' motions to dismiss the complaint without leave to amend, determining that plaintiffs failed to state a cognizable claim for relief under the Constitution. This appeal followed.

We have jurisdiction over the appeal pursuant to *28 U.S.C. § 1291.* We review *de novo* a dismissal under Fed. R. Civ. P. 12(b)(6). *See Steckman v. Hart Brewing, Inc., 143 F.3d 1293, 1295 (9th Cir. 1998).*

DISCUSSION

Appellants cite three bases for their constitutional challenge to Rule 983: the Privileges and/or Immunities

Clauses, the First Amendment and the Due Process Clause of the Fourteenth Amendment. None is persuasive.

A. *The Privileges and/or Immunities Clauses*

1. Article IV § 2

Under the Privileges and Immunities Clause of Article IV, "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2. Appellants contend that, in allowing nonresidents to appear pro hac vice in California courts while denying the same right to California residents, Rule 983 impermissibly discriminates based on residence in violation of the Privileges and Immunities Clause. The four cases they cite in favor of this proposition forbid discrimination against an out-of-state applicant for bar admission who meets all of the necessary qualifications for bar membership except residence in the state. *See Barnard v. Thorstenn, 489 U.S. 546, 103 L. Ed. 2d 559, 109 S. Ct. 1294 (1989); Supreme Court of Va. v. Friedman, 487 U.S. 59, 101 L. Ed. 2d 56, 108 S. Ct. 2260 (1988); Frazier v. Heebe, 482 U.S. 641, 96 L. Ed. 2d 557, 107 S. Ct. 2607 (1987); Supreme Court of N.H. v. Piper, 470 U.S. 274, 84 L. Ed. 2d 205, 105 S. Ct. 1272 (1985).*

In this case, however, Appellants argue not that California is *favoring* its residents in violation of the Privileges and Immunities Clause, but rather that it is *discriminating against* its own residents in violation of the Clause. Such a broad interpretation of the Privileges and Immunities Clause would prohibit a state from basing admission to its bar on standards any more stringent than those of the least restrictive state. A California resident wishing to practice law in California but wanting to avoid the difficult California bar exam could become a member of the bar of the state with the least restrictive admissions

requirements, then demand admission to the California bar as a matter of right. The Constitution does not compel such a result. States have traditionally enjoyed the exclusive power to license and regulate members of their respective bars. *See Leis v. Flynt, 439 U.S. 438, 442, 58 L. Ed. 2d 717, 99 S. Ct. 698 (1979).* Appellants' challenge to Rule 983 based on the Privileges and Immunities Clause of Article IV has no merit.

2. The Fourteenth Amendment

Appellants also argue that Rule 983 violates the Privileges or Immunities Clause of the Fourteenth Amendment.[3] This Clause has traditionally protected only those rights accruing by virtue of being a citizen of the United States. *See, e.g.*, the *Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 21 L. Ed. 394 (1873);* John E. Nowak and Ronald D. Rotunda, *Constitutional Law* § 10.3 (5th ed. 1995). The Supreme Court declined to delineate these privileges and immunities with specificity in the *Slaughter-House Cases*, but included within their ranks "some which owe their existence to the Federal government, its National character, its Constitution, or its laws." *83 U.S. (16 Wall.) at 79.* The courts and legal commentators have interpreted the decision as rendering the Clause essentially nugatory. *See* Robert H. Bork, *The Tempting of America* 180 (1990) ("The privileges and immunities clause . . . has remained the cadaver that it was left by the *Slaughter-House Cases.*"); Laurence H. Tribe, *American Constitutional Law* 556 (2d ed. 1988) ("The *Slaughter-House* definition of national rights renders the fourteenth amendment's privileges or immunities clause technically superfluous . . . ."); Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the Slaughter-House Cases, 109 Yale L.J. 643, 646 (2000)* ("In contemporary constitutional discourse, *Slaughter-House* stands for one simple truth: that the Privileges or Immunities Clause is utterly incapable of performing any real work in the protection of individual rights against state interference, and

that any argument premised on the Clause is therefore a constitutional non-starter.").

The Supreme Court's recent decision in *Saenz v. Roe, 526 U.S. 489, 143 L. Ed. 2d 689, 119 S. Ct. 1518 (1999),* applied the Privileges or Immunities Clause in a right-to-travel context to hold that travelers deciding to become permanent residents of a new state enjoy "the right to be treated like other citizens of that State." *526 U.S. at 500-07. See* Laurence H. Tribe, Saenz *Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future - or Reveal the Structure of the Present, 113 Harv. L. Rev. 110, 182 (1999)* (referring to the "reawakening of privileges or immunities jurisprudence after more than a century of dormancy").

Appellants cite *Saenz* in support of their argument. However, they object to Rule 983 precisely because California treats them like all other residents of the state in mandating that they meet the requirements of state bar membership before they may practice in California courts. They request the right to elide these requirements - essentially, to gain preferential treatment over other California residents - by virtue of their prior membership in another state's bar. *Saenz* and the Fourteenth Amendment do not entitle Appellants to such an advantage over their co-residents. In requiring Appellants to meet the standard requirements for admission to the California bar, the State Bar is ensuring that they will be treated like all other California citizens. Again, Appellants' challenge fails.

B. *The First Amendment*

Appellants next contend that Rule 983's restrictions on their ability to gain pro hac vice status infringes on their First Amendment rights in three respects: by limiting their speech on behalf of their clients, by preventing them from freely

associating with clients and other attorneys and by restricting their ability to petition for redress of grievances.

Under Appellants' sweeping formulation of the First Amendment, *any* regulation of bar membership would be deemed unconstitutional. No case has ever suggested that states are constitutionally barred from regulating admission to their respective bars. Rather, as noted above, states traditionally have enjoyed the sole discretion to determine qualifications for bar membership. *See Leis, 439 U.S. at 442* ("Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions. The States prescribe the qualifications for admission to practice and the standards of professional conduct."); *cf. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 459, 56 L. Ed. 2d 444, 98 S. Ct. 1912 (1978)* (holding that an attorney's solicitation of clients, though entitled to some constitutional protection, was nevertheless subject to state regulation); *National Ass'n for the Advancement of Psychoanalysis v. California Bd. of Psychology (NAAP), 2000 U.S. App. LEXIS 23974, No. 99-15243, 2000 WL 1434626* (9th Cir. Sept. 29, 2000), at *8 (holding that states may regulate the licensing of psychoanalysts even though communication during the course of psychoanalysis is constitutionally protected). Accordingly, Appellants' First Amendment argument fails.

C. *The Due Process Clause*

Finally, Appellants contend that Rule 983 violates their due process rights because it automatically excludes California residents from appearing pro hac vice in California courts, without allowing for an exercise of discretion.

To allege a due process violation, a claimant must initially demonstrate the existence of a protectable property interest. *See Leis, 439 U.S. at 441-42; Perry v. Sindermann,*

408 U.S. 593, 601-02, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972). Here, Appellants allege that the right to practice law pro hac vice qualifies as such an interest. The Supreme Court has squarely rejected this claim. *See Leis, 439 U.S. at 443* ("There is no right of federal origin that permits such lawyers to appear in state courts without meeting that State's bar admission requirements."); *cf. NAAP, 2000 WL 1434626,* at *4-*8 (holding that California's mental health licensing scheme implicated no fundamental rights and was rationally related to a legitimate state interest). Accordingly, Appellants have no viable due process claim.

D. *Sanction*

The district court declined to impose monetary sanctions on attorney Giannini, but enjoined him from filing future challenges to California's system of bar admissions and regulation without first obtaining the consent of the Chief Judge of the Northern District. Though their initial brief is silent concerning the prefiling requirement, Appellants challenge it in their reply, contending that their suit advances genuine, nonfrivolous arguments and that the sanction amounts to censorship.[4] Because the issue was not raised in Appellants' opening brief and appellees had no opportunity to counter Appellants' argument, the issue has been waived. *See Smith v. Marsh, 194 F.3d 1045, 1052 (9th Cir. 1999).*

CONCLUSION

California Rule of Court 983 does not violate the Privileges and Immunities Clause of Article IV or the Privileges or Immunities Clause of the Fourteenth Amendment. Nor does it infringe on the rights guaranteed under the First Amendment or the Due Process Clause of the Fourteenth Amendment. While the California Legislature may choose to alter the requirements for pro hac vice admission to practice in California courts, it is not within the

province of the federal courts to do so. Accordingly, the opinion of the district court is

AFFIRMED.

Footnotes

* The Honorable Ruggero J. Aldisert, Senior Circuit Judge, United States Court of Appeals for the Third Circuit, sitting by designation.

[1] Rule 983 allows pro hac vice appearances in California courts, but provides as follows:

> No person is eligible to appear as counsel pro hac vice pursuant to this rule if (1) he is a resident of the State of California, or (2) he is regularly employed in the State of California, or (3) he is regularly engaged in substantial business, professional, or other activities in the State of California.

Cal. Rules of Court 983.

[2] Plaintiffs' complaint also alleged violations of the Commerce Clause, federal and state equal protection guarantees, state due process guarantees and *42 U.S.C. § 1983*, but those claims are not argued in this appeal.

[3] "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . ." U.S. Const. amend. XIV, § 1.

[4] Appellants' brief does mention the sanction at one point, declaring, "For the trial Court to . . . enter a Rule 11 sanction

and gag order in a published Order wherein she treats Appellants' counsel as her whipping boy - is an unconscionable debauchery." However, Appellants argued for reversal of the sanctions only in their reply.

No. C 98-1201 SI

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

RICHARD J. PACIULAN, WILLIAM A. KRUSE,
Plaintiffs,

v.

RONALD M. GEORGE, et al.,
Defendants.

March 9, 1999, Decided

March 9, 1999, Filed; March 10, 1999, Entered in Civil Docket

COUNSEL:
For RICHARD J. PACIULAN, WILLIAM A. KRUSE, Plaintiffs: Joseph R. Giannini, Los Angeles, CA.

For RONALD M. GEORGE, defendant: Peter K. Southworth, Eileen Gray, Bill Lockyer, CA Attorney General, CA State Attorney General's Office, Sacramento, CA.

For JUDY JOHNSON, JEROME BRAUN, defendants: Colin P. Wong, Lawrence Yee, Marie M. Moffat, The State Bar of California, Office of General Counsel, San Francisco, CA.

JUDGES:
SUSAN ILLSTON, United States District Judge.

OPINIONBY:
SUSAN ILLSTON

OPINION: ORDER:

(1) GRANTING DEFENDANTS' MOTIONS TO DISMISS WITHOUT LEAVE TO AMEND;

(2) DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT; AND

(3) GRANTING DEFENDANTS' MOTIONS FOR SANCTIONS BY IMPOSING A PRE-FILING REQUIREMENT

On July 24 and September 4, 1998, the Court heard argument on defendants' motions to dismiss and for sanctions, and plaintiffs' counter motion for summary judgment.[1] Having carefully considered the arguments of counsel and the submitted papers, the Court hereby GRANTS defendants' motions to dismiss plaintiffs' complaint without leave to amend; DENIES plaintiffs' motion for summary judgment; and GRANTS defendants' motions for sanctions. A final and appealable judgment on this order will be filed separately by the Court.

BACKGROUND

The instant action is the third in a recent series of cases filed by attorney Joseph Giannini challenging the validity of the requirements for admission to practice law in California. This case presents a facial challenge to the constitutionality of California Rule of Court 983.[2] Plaintiffs are California residents who allege that they are licensed to practice law in states other than California but are not licensed to practice law in California. Plaintiffs wish to be admitted pro hac vice under Rule 983, but are precluded from doing so because they are California residents. Defendants are the Justices of

the California Supreme Court ("Supreme Court defendants"), whom plaintiffs contend are charged with promulgating Rule 983, and individuals from the State Bar of California ("State Bar defendants"). Plaintiffs challenge the constitutionality of the language in Rule 983 prohibiting California residents from appearing pro hac vice [3] in California state courts under the Privileges and Immunities Clause, the Commerce Clause, the First Amendment of the United States Constitution, and the Due Process and Equal Protection guarantees of the United States and California Constitutions.

1. Related Litigation

Plaintiffs are represented by Joseph Giannini ("Giannini"), an attorney[4] who has filed a number of federal actions challenging the validity of the requirements for admission to practice law in federal and California state courts. In 1987, after failing the July 1986 and February 1987 California Bar Examinations, Giannini filed suit in federal district court in the Central District of California in his own name against the State Bar of California's Committee of Bar Examiners. See *Giannini v. Committee of Bar Examiners, 847 F.2d 1434 (9th Cir. 1988).* In that suit, Giannini alleged that the California Bar Examination unconstitutionally discriminated against out-of-state attorneys and violated the Privileges and Immunities Clause of Article IV, the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and the Commerce Clause. The district court dismissed Giannini's complaint on the ground that it lacked subject matter jurisdiction to review the action of the Committee of Bar Examiners. The Ninth Circuit, in a per curiam opinion, affirmed the district court's dismissal, holding that the Committee's decision was reviewable by the California Supreme Court and that until such review was completed, Giannini had no basis for any claim of deprivation under federal law. *Id. at 1435.*

In 1988, Giannini filed suit in the Central District of California on his own behalf against the California Supreme Court and the named Justices of that Court, the Committee of Bar Examiners and the Committee's individual members, and the federal district courts for the Central, Southern, and Eastern Districts of California and the individual judges of those Courts. See *Giannini v. Real, 911 F.2d 354 (9th Cir. 1990)*, cert. denied, *498 U.S. 1012, 112 L. Ed. 2d 585, 111 S. Ct. 580 (1990)*. Giannini challenged the constitutionality of the California Bar Examination and the local rules of the United States District Courts for the Central, Southern, and Eastern Districts of California, which required attorneys seeking admission to those courts to be members in good standing of the California State Bar. The district court denied Giannini's motions for (1) summary judgment, (2) a preliminary injunction ordering his admission to the California bar, (3) default judgment against named members of the Committee of Bar Examiners, and (4) criminal sanctions against the Committee's attorneys. The district court dismissed Giannini's claims against the state defendants on the ground of res judicata. On appeal, the Ninth Circuit affirmed the district court's order of dismissal, holding that Giannini had failed to state a claim against the state defendants under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, the Privileges and Immunities Clause, and the Commerce Clause. *911 F.2d at 357-59*. In addition, the Ninth Circuit upheld the district court's dismissal of Giannini's claims against the federal defendants. *Id. at 359-61*.

In 1992, Giannini filed suit in the Central District of California on behalf of himself and two other named plaintiffs, Mimi Morissette and Patricia Miller Rosenthal, against the State Bar of California's Committee of Bar Examiners, numerous State Bar officials, the California Supreme Court, and the named Justices of that Court. See Morissette v. Yu, No. 92-03252 (C.D. Cal. 1992). Plaintiffs

alleged that California Rule of Court 983, which is the same rule challenged in the instant suit, violated Giannini's right to practice law under the Privileges and Immunities Clause and violated Morissette's and Rosenthal's First and Fourteenth Amendment rights. In addition, plaintiffs alleged that the Central District was required to admit Giannini to practice before it, and that the Committee of Bar Examiner's failure to certify Giannini for admission to the California bar after the July 1991 Bar Examination was arbitrary, capricious, and vindictive.

This complaint was dismissed on November 16, 1992. See Morissette v. Yu, No. 92-03253 (C.D. Cal. Nov. 16, 1992) (Order Granting Defendants' Motions to Dismiss, Denying Plaintiffs' Motion for an Order Admitting Joseph R. Giannini, Esq., to the California State and Central District Bars, and Ordering Joseph R. Giannini, Esq., to Show Cause Re: Rule 11 Sanctions). Plaintiffs subsequently requested and were granted leave to file an amended complaint. The amended complaint incorporated the allegations of the original complaint and further alleged (1) that defendant retaliated against Giannini for exercising his First Amendment right of criticism, (2) that Rule 983 violated Morissette's and Rosenthal's First Amendment right to associate with Giannini and Sixth Amendment right to counsel, and (3) that Rule 983 violated the Commerce Clause. The district court subsequently dismissed plaintiffs' amended complaint without leave to amend and ordered Giannini to pay monetary sanctions for signing a frivolous complaint, having an improper purpose, and making scandalous allegations against various judges and defendants. See Morissette v. Yu, No. 92-03253 (C.D. Cal. May 26, 1993) (Order Granting Defendants' Motions to Dismiss, Denying Plaintiffs' Motions for Partial Summary Judgment and for an Order Admitting Joseph R. Giannini, Esq., to the California State and Central District Bars, and Ordering Joseph R. Giannini, Esq., and Gerard A. Fierro, Esq., to

Show Cause Re Sanctions). In Morissette, Mr. Giannini also moved to disqualify the assigned judge, John G. Davies. Judge Davies declined to recuse himself, and Judge Ideman denied the motion.

On appeal, the Ninth Circuit affirmed the district court's dismissal of the first amended complaint, affirmed the district court's award of sanctions, and awarded additional sanctions against Giannini for filing a frivolous appeal, in an amount equal to double the costs of appeal. See *Morissette v. Yu, 1994 U.S. App. LEXIS 7992,* No. 93-56288 (9th Cir. Mar. 8, 1994). In particular, the Ninth Circuit held that plaintiffs' constitutional challenges to Rule 983 and the California Bar Examination were barred by principles of res judicata. See *id., 1994 U.S. App. LEXIS 7992,* at *6 ("If his challenge to Rule 983 was not included in [his] general challenge [to the constitutionality of the form and content of the California Bar Examination], it could have been, so it is barred by the judgment in that case.") (citing *Clark v. Bear Stearns & Co., Inc., 966 F.2d 1318, 1320 (9th Cir. 1992)).* The Ninth Circuit also affirmed the denial of Mr. Giannini's motion to recuse Judge Davies.

On July 7, 1997, Giannini filed an action entitled McKenzie v. Rehnquist in federal district court in Washington, D.C., against the United States Judicial Conference and its individual judge members, alleging that the local rules governing attorney admission in many federal district courts violate federal law, including Title VII, as well as the First Amendment, the Fourteenth Amendment Equal Protection Clause, the Fifth Amendment Due Process Clause, the Fifth Amendment right to property, the right to travel, and the Full Faith and Credit Clause of Art. IV, § 1 of the United States Constitution. The Court is unaware of the disposition of this litigation.

2. Litigation Before This Court

A. McKenzie et al., v. George, et al., C 97-0403 SI

On February 4, 1997, Giannini filed McKenzie et al., v. George, et al., C 97-0403 SI on behalf of a number of individuals against the individual Justices of the California Supreme Court. Jerome Braun and Judy Johnson of the State Bar intervened. In McKenzie v. George, C 97-0403 SI, the plaintiffs advanced the same challenges to Rule 983 that the instant plaintiffs raise in this litigation. The only differences between McKenzie and Paciulan are that (1) the plaintiffs are different individuals; (2) the Paciulan plaintiffs have alleged additional claims that Rule 983 violates the Due Process and Equal Protection guarantees of the California Constitution; and (3) the McKenzie plaintiffs alleged that Rule 983 violated the Supremacy Clause.

By order filed July 22, 1997, the Court dismissed the McKenzie complaint without leave to amend.[5] The Court concluded that the plaintiffs had failed to state claims for which relief could be granted. On August 11, 1997, the plaintiffs filed a motion to vacate the judgment under Federal Rule of Civil Procedure 59(e). By order dated October 7, 1997, the Court denied the plaintiffs' motion to vacate as untimely, and noted that even if the motion had been timely and filed as a motion for reconsideration, the Court would have denied the motion because the plaintiffs had not met the substantive requirements of Civil Local Rule 7-9. [6] On October 17, 1997, the plaintiffs filed a motion to vacate the Court's October 7 Order, arguing its reasoning was flawed because, inter alia, a separate judgment is required under Rule 59 and therefore the motion to vacate was not late. On November 5, 1997, the Court denied the plaintiffs' second motion to vacate. Recognizing that confusion had arisen due to the absence of a separate judgment, the Court issued a separate judgment on the Court's July 22, 1997 order of dismissal. In the November 5 order, the Court made clear to all parties that the judgment was final and appealable.

On February 20, 1998, the plaintiffs filed a motion to vacate the Court's November 5, 1997 judgment. The plaintiffs contended that they did not receive notice of the judgment until January 22, 1998, when opposing counsel fixed Giannini copies of the November 5, 1997 order and judgment. The plaintiffs moved for relief pursuant to Federal Rule of Civil Procedure 60(b)(6). Although the court files indicated that the order and judgment were served on all parties of record, the Court assumed for purposes of deciding the plaintiffs' motion that they did not receive notice of the judgment. The Court denied the plaintiffs' motion, finding that it was without power to vacate and reenter the judgment due to the strict limitations contained in Rule 4 of the Federal Rules of Appellate Procedure. Under Rule 4, a district court may reopen the time for appeal in the event a party has not received notice of the judgment only if the party files a motion to reopen within 180 days of the entry of judgment or within 7 days of receipt of such notice, whichever is earlier. In McKenzie v. George, the plaintiffs admitted that they received notice of the judgment from the opposing counsel on January 22, 1998 and that they waited 29 days to file their motion to vacate. Accordingly, the Court found that it was without authority to vacate the November 5, 1997 judgment.

B. Paciulan et al., v. George, et al., C 98-1201 SI and McKenzie et al., v. Wilson, et al., C 98-0580 SI

On March 25, 1998, Giannini filed the instant lawsuit on behalf of plaintiffs Richard Paciulan and William Kruse challenging Rule 983 as unconstitutional. Giannini and plaintiffs acknowledge that the instant lawsuit "parallels" the litigation in McKenzie v. George, C 97-0403 SI, and state that "had the plaintiffs known about the Court's November 5, 1997 decision [in McKenzie v. George], this lawsuit would not have been necessary." Complaint P 8. On February 12, 1998, Giannini filed McKenzie v. Wilson, C 98-0580 SI on behalf of nine individuals contending that California's failure to provide reciprocity in bar admissions is unconstitutional.

The plaintiffs in McKenzie v. Wilson are nine attorneys who reside in California, eight of whom are admitted to bars of other states but not California, and one of whom is admitted to the California bar and alleges that he is precluded from moving out of California because other states will not grant him automatic admission to their bars because of California's lack of reciprocity. [7] McKenzie v. Wilson was filed as a class action. Plaintiffs in McKenzie v. Wilson acknowledge that it raises many, if not all, of the same issues as are raised in McKenzie v. George and Paciulan v. George. See Joint Case Management Conference Statement filed in McKenzie v. Wilson on June 9, 1998 at 5:20-21 ("Plaintiffs request a stay of this case for 60 days pending a decision in a related case, Paciulan v. George, as that ruling may dispose of issues in this action."). The defendants in McKenzie v. Wilson have also filed motions to dismiss and for sanctions.

DISCUSSION

1. Defendants' Motions to Dismiss

A. Legal Standard

Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a complaint if it fails to state a claim upon which relief can be granted. The question presented by a motion to dismiss is not whether the plaintiffs will prevail in the action, but whether the plaintiffs are entitled to offer evidence in support of the claim. See *Scheuer v. Rhodes, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974).*

In answering this question, the Court must assume that the plaintiff's allegations are true and must draw all reasonable inferences in the plaintiffs' favor. See *Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987).* Even if the face of the pleadings suggests that the chance of recovery is remote, the Court must allow the plaintiffs to

develop the case at this stage of the proceedings. See *United States v. City of Redwood City, 640 F.2d 963, 966 (9th Cir. 1981).*

If the Court chooses to dismiss the complaint, it must then decide whether to grant leave to amend. In general, leave to amend is only denied if it is clear that amendment would be futile and "that the deficiencies of the complaint could not be cured by amendment." *Noll v. Carlson, 809 F.2d 1446, 1448 (9th Cir. 1987)* (quoting *Broughton v. Cutter Laboratories, 622 F.2d 458, 460 (9th Cir. 1980)* (per curiam)); see *Poling v. Morgan, 829 F.2d 882, 886 (9th Cir. 1987)* (citing *Foman v. Davis, 371 U.S. 178, 182, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962))* (futility is basis for denying amendment under Rule 15).

. Analysis

In their motions to dismiss, defendants raise the following three arguments: (1) plaintiffs are collaterally estopped from claiming that Rule 983 is unconstitutional, (2) plaintiffs lack standing to challenge Rule 983, and (3) plaintiffs fail to state a claim. Each of these arguments will be addressed in turn.

(1) Collateral Estoppel

Defendants argue that Giannini's previous litigation, and most especially this Court's dismissal of McKenzie v. George, C 97-0403 SI, should collaterally estop Giannini and the present plaintiffs from alleging their claims in the instant lawsuit. Defendants contend that Giannini is manipulating the legal system by enlisting different individuals to act as plaintiffs in various cases in an effort to avoid the bars of res judicata and collateral estoppel. At argument on defendants' motions to dismiss, Giannini argued that the related litigation should have no bearing on the instant lawsuit, despite plaintiffs' acknowledgment that this case "parallels" the litigation in McKenzie v. George. Giannini urged the Court to ignore its previous dismissal of the claims in McKenzie v.

George, and quoted Ralph Waldo Emerson's admonition that "A foolish consistency is the hobgoblin of little minds . . . ." [8]

Although defendants are correct that Giannini has been involved, either as a lawyer or a party, in many cases challenging California's rules governing the practice of law, the instant plaintiffs have not, and for that reason the Court declines to find that plaintiffs are collaterally estopped in this litigation from challenging Rule 983. Accordingly, the Court reviews all of plaintiffs' arguments on the merits. As set forth below, the Court concludes for all of the reasons explained in its previous order in McKenzie v. George that plaintiffs have not stated a claim. Furthermore, although plaintiffs argue that changed circumstances and new law establish that this Court's previous order was "fundamentally flawed," the Court concludes that these circumstances and case law do not alter the analysis.

(2) Standing

The State Bar defendants argue that plaintiffs' constitutional challenges fall short of a justiciable controversy appropriate for federal judicial review. In particular, defendants cite to the Ninth Circuit's unpublished opinion in *Morissette v. Yu, 1994 U.S. App. LEXIS 7992,* at *7, No. 93-56288 (9th Cir. Mar. 8, 1994) ("Nor does Mr. Giannini claim to have applied for admission under Rule 983. Such an application is a precondition to standing to challenge the rule.") (citing *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992)).* According to defendants, plaintiffs have not alleged that they applied for pro hac vice status in a particular pending state court proceeding and that they were denied pro hac vice status. As such, defendants conclude that plaintiffs lack standing.

In response, plaintiffs submit affidavits, indicating that they, as California residents, have been chilled from seeking pro hac vice status given the clear language of Rule 983. See,

e.g., Plaintiffs' Motion for Summary Judgment, Exh. A, P 11 ("I am thwarted from applying for pro hac vice by [Rule 983's] automatic and highly embarrassing automatic disqualification provisions.") (Declaration of Richard J. Paciulan); id. at Exh. B, P 12 (same) (Declaration of William A. Kruse). [9]

While some language in the Ninth Circuit's unpublished Morissette opinion casts doubt on plaintiffs' standing, other published Ninth Circuit opinions note that standing may be found in circumstances like these where further application would be futile. See *Desert Outdoor Advertising, Inc. v. City of Moreno Valley, 103 F.3d 814, 818 (9th Cir. 1996)*, cert. denied, *522 U.S. 912, 118 S. Ct. 294, 139 L. Ed. 2d 227 (1997)* ("Desert and OMG also have standing to challenge the permit requirement, even though they did not apply for permits, because applying for a permit would have been futile."). In any event, assuming for purposes of argument that plaintiffs have standing, plaintiffs have nevertheless failed to state a claim.

(3) Failure to State a Claim

Plaintiffs challenge Rule 983 under the Privileges and Immunities Clause, the Commerce Clause, the First Amendment, and the Equal Protection and Due Process Clauses of the Fourteenth Amendment and the California Constitution. Consistent with prior holdings in the cases filed by plaintiffs' attorney -- including this Court's recent dismissal of McKenzie v. George -- and controlling Supreme Court authority, the Court finds that plaintiffs have failed to state a claim upon which relief may be granted.

(a) Equal Protection Under State and Federal Constitutions

Plaintiffs contend that Rule 983 violates the Equal Protection Clauses of the California Constitution and the Fourteenth Amendment of the United States Constitution by

treating California and non-California residents differently. Plaintiffs do not argue that residence is a suspect class. Instead, plaintiffs contend that Rule 983 implicates three fundamental personal rights, and therefore that strict scrutiny is warranted. According to plaintiffs, Rule 983 violates plaintiffs' (1) First Amendment rights to speech in a public forum, association, and petition for redress of grievances, (2) constitutionally protected right of access to the courts, and (3) constitutionally protected right to practice law. Plaintiffs alternatively argue that Rule 983 fails to survive the lower "rational basis" standard of review. The Court concludes that Rule 983 does not implicate any fundamental rights, and therefore that the appropriate standard of review is rational basis.

(i) First Amendment

Plaintiffs bring a facial challenge to Rule 983, and therefore must satisfy a strict standard. See *Legal Aid Society of Hawaii v. Legal Services Corp., 145 F.3d 1017, 1023 (9th Cir. 1998).* As the Supreme Court stated in *Rust v. Sullivan, "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." 500 U.S. 173, 183, 111 S. Ct. 1759, 1767, 114 L. Ed. 2d 233 (1991)* (citation omitted). Plaintiffs fall far short of meeting this stringent standard.

Plaintiffs rely primarily on the Ninth Circuit's decision in *Perry v. Los Angeles Police Department, 121 F.3d 1365 (9th Cir. 1997),* cert. denied, *523 U.S. 1047, 118 S. Ct. 1362, 140 L. Ed. 2d 511 (1998),* for the proposition that Rule 983 constitutes "speaker discrimination" in violation of the First Amendment. In Perry, the Ninth Circuit struck down an ordinance that prohibited the sale of merchandise or solicitation of donations on sidewalks or public ways. The ordinance provided for two exceptions: (1) the sale of newspapers, magazines and periodicals, and (2) the

solicitation of donations and the sale of merchandise by nonprofit organizations if the merchandise had a religious, philosophical or ideological message or statement relevant to the organization's purpose. The plaintiffs were two individuals -- one a musician and street performer, the other an animal rights activist -- who sought to solicit donations and sell merchandise but were prohibited by the ordinance. The Ninth Circuit noted that the ordinance regulated traditional public forums, sidewalks and public ways, and then held that the plaintiffs' activities were fully protected speech under the First Amendment. The court then held that while the ordinance was content neutral, the ordinance was unconstitutional because it was not narrowly tailored to effectuate its goal of protecting local merchants and aiding free traffic flow.

This Court concludes that Perry does not aid plaintiffs' argument that Rule 983 constitutes impermissible "speaker discrimination." A critical distinction between Perry and the instant case is that plaintiffs' desired activity -- the practice of law in California -- is itself protected speech under the First Amendment. Plaintiffs apparently argue that any restriction on practicing law in California implicates attorneys' rights under the First Amendment. However, as the Supreme Court has noted, "A lawyer's procurement of remunerative employment is a subject only marginally affected with First Amendment concerns. It falls within the State's proper sphere of economic and professional regulation." *Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 459, 98 S. Ct. 1912, 1920, 56 L. Ed. 2d 444 (1978).* Unlike the regulation in Perry, which directly targeted expressive conduct, Rule 983 limits speech, if at all, only indirectly by regulating who can practice law in California. As the Supreme Court noted in *City of Dallas v. Stanglin, 490 U.S. 19, 25, 109 S. Ct. 1591, 1595, 104 L. Ed. 2d 18 (1989),* "it is possible to find some kernel of expression in almost every activity a person undertakes . . . but such a kernel is not sufficient to bring the activity within the

protection of the First Amendment." The Supreme Court has repeatedly emphasized the authority of each state to promulgate its own requirements to practice law in the state. See *Leis v. Flynt, 439 U.S. 438, 443, 99 S. Ct. 698, 701, 58 L. Ed. 2d 717 (1979)* ("The Constitution does not require that because a lawyer has been admitted to the bar of one State, he or she must be allowed to practice in another."); see also *id. 439 U.S. at 444 n. 5, 99 S. Ct. at 701 n.5* ("Such an asserted right [of a lawyer to practice in the court of every State] flies in the face of the traditional authority of state courts to control who may be admitted to practice before them."); *Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 283 n.16, 105 S. Ct. 1272, 1278 n.16, 84 L. Ed. 2d 205 (1985)* ("Our holding in this case does not interfere with the ability of the States to regulate their bars. The nonresident who seeks to join a bar, unlike the pro hac vice applicant, must have the same professional and personal qualifications required of resident lawyers.").

Plaintiffs' arguments that Rule 983 violates their right to association and right of access to the courts are similarly unavailing. Plaintiffs provide no case law in support of their argument that Rule 983 infringes on their right to association. However, plaintiffs argue "if a citizen has a Sixth Amendment right to associate with *pro hac vice* counsel to petition for redress of grievances: an attorney has a First Amendment right to associate with the client and petition for redress." Plaintiffs' Motion for Summary Judgment, 27:23-26. As discussed in greater detail infra, courts have found that a criminal defendant's Sixth Amendment right to counsel includes the right to have an out-of-state lawyer admitted pro hac vice. See *United States v. Ries, 100 F.3d 1469, 1471 (9th Cir. 1996)*, cert. denied, *U.S. , 118 S. Ct. 134 (1997)*. It does not follow, however, that the criminal defendant's lawyer has a First Amendment right to associate with that criminal defendant. Once again, simply because a rule

regulates the practice of law in California does not mean that the rule implicates First Amendment concerns.

In support of their argument that Rule 983 violates plaintiffs' right of access to the courts, plaintiffs cite *Delew v. Wagner, 143 F.3d 1219 (9th Cir. 1998)*. In Delew, the plaintiffs' daughter had been killed in a traffic accident. The plaintiffs filed a wrongful death action in state court, and later filed a *42 U.S.C. § 1983* action alleging that the defendant police department and individual police officers had conspired in connection with the state court litigation to cover up the facts surrounding the death of the plaintiffs' daughter. The district court dismissed the plaintiffs' complaint without leave to amend. On appeal, the Ninth Circuit reversed, finding that the plaintiffs had stated a claim under *42 U.S.C. § 1983* for denial of meaningful access to the courts. "The Constitution guarantees plaintiffs the right of meaningful access to the courts, the denial of which is established where a party engages in pre-filing actions which effectively covers-up evidence and actually renders any state court remedies ineffective." *Id. at 1222.*

Delew is inapposite to the instant case, as plaintiffs do not allege that defendants have engaged in a "cover up" in some related litigation. Rather, it appears that plaintiffs cite Delew for the general proposition that there is a constitutional right of access to the courts. The fact that Rule 983 prohibits residents of California from practicing law in California pro hac vice does not deny plaintiffs "meaningful access to the courts." Plaintiffs may still bring their claims in California courts as litigants; they simply may not bring claims as lawyers without first satisfying California's rules for admission to the state bar. As with plaintiffs' [**30] other claims under the First Amendment, plaintiffs have not alleged a denial of their First Amendment rights simply because they may not practice law in California due to a failure to fulfill the requirements for admission to the State Bar.

(ii) Right to Practice Law

The Court also rejects plaintiffs' argument that Rule 983 violates the "constitutionally protected" right to practice law. The Supreme Court has indicated that the right to practice law is not a fundamental right for the purposes of the Fourteenth Amendment. See *Leis v. Flynt, 439 U.S. at 442 n.5, 99 S. Ct. 698, 701-02 n.5; Schware v. Board of Bar Examiners, 353 U.S. 232, 238-39, 77 S. Ct. 752, 755-56, 1 L. Ed. 2d 796 (1957);* see also *Edelstein v. Wilentz, 812 F.2d 128, 132 (3d Cir. 1987)* ("The right to practice law is not a fundamental right for purposes of due process or equal protection analysis."). Relying on Supreme Court of New Hampshire v. Piper, plaintiffs argue that the right to practice law is a fundamental right protected under the Privileges and Immunities Clause. However, as the Third Circuit recently held, "'fundamental' privileges and immunities are not interchangeable with the rights deemed 'fundamental' for equal protection purposes." *Tolchin v. Supreme Court of the State of New Jersey, 111 F.3d 1099, 1114* (3d Cir.), cert. denied, *522 U.S. 977, 118 S. Ct. 435, 139 L. Ed. 2d 334 (1997)* (citing *Friedman v. Supreme Court of Virginia, 822 F.2d 423, 426 (4th Cir. 1987),* aff'd *487 U.S. 59, 108 S. Ct. 2260, 101 L. Ed. 2d 56 (1986)* ("recognizing that "the Privileges and Immunities Clause protects more [rights] than those rights which are considered fundamental individual rights protected by the Fourteenth Amendment.")). The Court will address plaintiffs' claims under the Privileges and Immunities Clause in a later section of this Order.

Similarly, plaintiffs' reliance on *United States v. Ries, 100 F.3d 1469 (9th Cir. 1996),* cert. denied, *U.S. , 118 S. Ct. 134 (1997),* for the proposition that Rule 983 infringes the fundamental right to practice law is misplaced. Ries held that a criminal defendant's Sixth Amendment right to counsel includes the right to have an out-of-state lawyer admitted pro hac vice; Ries held nothing about a lawyer's right under the Equal Protection Clause to practice law. Moreover, Ries

undercuts plaintiffs' arguments in that the Ninth Circuit recognized that a state can impose standards for admission of pro hac vice counsel, and that these standards can differ from the standards imposed on counsel who seek permanent admission to the bar. *Id. at 1471.* Other courts have noted the distinction between a lawyer's right to practice law pro hac vice and a litigant's right to pro hac vice counsel. See, e.g., *Roma Construction Co. v. Russo, 96 F.3d 566, 577 (1st Cir. 1996)* ("While it may be that [the lawyer] has no right to pro hac vice admission,. . . the rights of the plaintiffs are another matter.") (citing Leis)).

(iii) Rational Review Under Equal Protection

Because Rule 983 does not implicate any fundamental rights, the Court need only determine if there exists a rational basis for California's pro hac vice rule. According to defendants, Rule 983 extends comity to out-of-state attorneys for occasional appearances in the courts of this state in order to accommodate residents who desire such counsel. In particular, Rule 983 is an exception to the general rule that individuals must meet State Bar requirements in order to practice law in California. Defendants argue that it is rational and reasonable for the State Bar to require California residents to pass the bar examination, and that it is rational to allow nonresidents to practice in California without having satisfied these requirements on a limited basis through Rule 983.

Plaintiffs argue that Rule 983 is not rational because a lawyer's residence has no correlation to his competence to practice law. Plaintiffs first argue that Rule 983 is unconstitutional under the California Supreme Court's holding in *Raffaelli v. Committee of Bar Examiners, 7 Cal. 3d 288, 294, 101 Cal. Rptr. 896, 496 P.2d 1264 (1972).* In Raffaelli, the California Supreme Court struck down a California statute excluding aliens from admission to the State Bar. The plaintiff in Raffaelli was an Italian citizen who

went to law school in California and passed the California bar exam, but was nevertheless refused admission to the State Bar because he was a citizen of Italy. Employing strict scrutiny analysis because alienage is a suspect class, the Court found that there was no compelling reason to deny aliens admission to the bar.

Raffaelli is distinguishable from the instant case on several grounds. First, Raffaelli involved discrimination based on alienage, a suspect classification warranting strict scrutiny analysis. The instant case, by contrast, involves alleged discrimination on the basis of state residence, a classification subject only to rational basis review. Second, the Court concluded that the plaintiff in Raffaelli should be admitted to the State Bar as long as he satisfied the nonalienage-based certification requirements, such as passing the California Bar Examination and being determined to be of good moral character. See *id. at 304*. Thus, the Raffaelli court recognized that California has a legitimate interest in regulating the practice of law within the state.

Plaintiffs next argue that Piper and its progeny stand for the proposition that discrimination in bar admission on the basis of residence is arbitrary. This argument is simply another attempt by plaintiffs to import Privileges and Immunities analysis into their Equal Protection claims, an argument that this Court has repeatedly rejected. [10] *Piper, Barnard v. Thorstenn, 489 U.S. 546, 109 S. Ct. 1294, 103 L. Ed. 2d 559 (1989)* and *Supreme Court of Virginia v. Friedman, 487 U.S. 59, 108 S. Ct. 2260, 101 L. Ed. 2d 56 (1988)* were decided under the Privileges and Immunities Clause, not Equal Protection, [11] and in each case the Court analyzed the residency requirement to determine "'(i) if there is a substantial reason for the difference in treatment; and (ii) [if] the discrimination practiced against nonresidents bears a substantial relationship to the State's objective.'" *Barnard, 489 U.S. at 553, 109 S. Ct. at 1299* (quoting *Piper, 470 U.S. at 284, 105 S. Ct. at 1278)*). Thus, plaintiffs are incorrect

when they imply that the Supreme Court struck down the residency requirements under rational basis review. As stated above, the Court will review these cases and plaintiffs' arguments in connection with plaintiffs' claims under the Privileges and Immunities Clause.

Finally, plaintiffs argue that a number of recent developments establish that Rule 983 is irrational and arbitrary. Plaintiffs make much of former Governor Wilson's public criticism of the State Bar as "bloated, arrogant, oblivious and unresponsive." Plaintiffs' Motion for Summary Judgment, 4:23-27. However, Governor Wilson's criticisms of the State Bar are completely irrelevant to whether Rule 983 is unconstitutional.

Plaintiffs also cite three different rules governing the practice of law in California as evidence that Rule 983 is arbitrary. Rule 76.6, which was passed in February 1998, defines the minimum qualifications for attorneys appointed to represent people in the California Supreme Court in death penalty appeals and habeas corpus proceedings related to sentences of death. Plaintiffs argue that Rule 76.6 authorizes qualified "sister-state attorneys" to apply for pro hac vice admission in death penalty cases regardless of their office or residence location. The Court finds no inconsistency between Rule 983 and Rule 76.6, as both allow for limited circumstances under which nonresident lawyers may practice law in California. Similarly, Rule 983.2, which plaintiffs also cite as inconsistent with Rule 983, permits limited, supervised appearances by law students who are certified by the State Bar. Neither Rule 76.6 nor Rule 983.2 is inconsistent with Rule 983, and neither establishes the "arbitrariness" of Rule 983. Finally, plaintiffs cite California Rule of Professional Conduct 1-100, which authorizes lawyers from other jurisdictions to engage in "lawyer functions" in California and subjects such lawyers to the jurisdiction of the California State Bar for any alleged ethical impropriety. Plaintiffs imply that it is unfair that these

lawyers are subject to discipline by the State Bar, yet are "automatically disqualified" from applying for pro hac vice admission in California. Once again, the Court sees no inconsistency between Rule 983 and California Rule of Professional Conduct 1-100.

"In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Communications, Inc., 508 U.S. 307, 313, 113 S. Ct. 2096, 2101, 124 L. Ed. 2d 211 (1993).* The Court concludes that Rule 983 meets the "rational basis" test for equal protection purposes. The State Bar has rationally determined that a particular subset of attorneys -- namely, attorneys not residing in California, not regularly employed in California, and not regularly engaged in substantial business, professional, or other activities in California -- may be particularly burdened if they were forced to meet the general requirements for admission in California in order to make the occasional court appearance. That the State Bar does not allow California residents to apply for pro hac vice admission does not mean that the State Bar has determined that these residents are incompetent to practice law. Instead, as defendants argue, it is rational for the State Bar to limit pro hac vice admission to nonresidents to prevent California residents from using pro hac vice to circumvent this state's stringent bar membership requirements. Plaintiffs question the wisdom of adopting such a Rule, and note both that California has afforded other professions reciprocal licensing and that legal groups have recommended that California grant full reciprocity for qualified and experienced sister-state attorneys. However, the issue before the Court is not whether California has promulgated the best rule or whether California's rule can even be considered wise. Instead, the Court need only

determine whether there exists a rational basis for Rule 983. In the Court's view, it is rational for the State Bar to require California residents who wish to practice law in the state to fulfill a number of prerequisites, including successful completion of the California Bar Examination. It is also rational to exempt nonresident attorneys from fulfilling all of these requirements in the interest of allowing California residents their counsel of choice. Accordingly, defendants' motion to dismiss plaintiffs' equal protection claim is GRANTED.

(b) Privileges and Immunities Clause

Plaintiffs argue that insofar as Rule 983 discriminates on the basis of residence, it violates the Privileges and Immunities Clauses of Art. IV, § 2, the Fourteenth Amendment, *42 U.S.C. § 1983*, and the California Constitution. [12] The Court has already discussed and dismissed plaintiffs' claims of privileges and immunities under the Fourteenth Amendment. As for plaintiffs' claim that Rule 983 violates the privileges and immunities clause of *42 U.S.C. § 1983*, plaintiffs are mistaken in their belief that § 1983 contains a privileges and immunities clause. Section 1983 is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred. See *Graham v. Connor, 490 U.S. 386, 393-94, 109 S. Ct. 1865, 1870, 104 L. Ed. 2d 443 (1989)*. Accordingly, the Court focuses on plaintiffs' claims that Rule 983 violates the Privileges and Immunities Clause of Article 4, § 2 and the California Constitution. As plaintiffs advance identical arguments under the federal and state constitutions, the analysis for both is the same.

In support of their claims, plaintiffs cite the Supreme Court's holding in *Piper, 470 U.S. 274, 105 S. Ct. 1272, 84 L. Ed. 2d 205 (1985)*, and argue that California's prohibition on limited, pro hac vice appearances by residents is similar to

New Hampshire's restriction on the practice of law by nonresidents in Piper.

Defendants argue that Piper and the related cases regarding residency requirements for bar admission are inapposite for two reasons. First, defendants note that nothing in these cases suggests that residents of a state can invoke the Privileges and Immunities Clause to challenge alleged discrimination against residents and in favor of nonresidents. Second, defendants argue that Piper and the related cases involved challenges to residency requirements by otherwise qualified attorneys who were precluded from practicing law solely on the basis of their residence. As the Supreme Court stated in *Supreme Court of Virginia v. Friedman, "Piper establishes that a nonresident who takes and passes an examination prescribed by the State, and who is otherwise qualified for the practice of law, has an interest in practicing law that is protected by the Privileges and Immunities Clause." 487 U.S. 59, 65, 108 S. Ct. 2260, 2264, 101 L. Ed. 2d 56 (1988).* In the instant case, plaintiffs are prohibited from practicing law in California not because of their residence, but because they have not fulfilled the requirements for admission to the State Bar and therefore are not "otherwise qualified."

The Court sees no reason to depart from its reasoning in McKenzie v. George, C 97-0403 SI finding that plaintiffs did not state a claim under the Privileges and Immunities Clause. In McKenzie, the Court noted that plaintiffs' Privilege and Immunities arguments had been rejected previously in Morissette v. Yu. The district court in Morissette held as follows:

> To show that the Privileges and Immunities Clause bars the use of residency to deny a lawyer the privilege of practicing, Plaintiffs cite three cases: *Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 105 S. Ct.*

> *1272, 84 L. Ed. 2d 205 (1985), Supreme Court of Virginia v. Friedman, 487 U.S. 59, 108 S. Ct. 2260, 101 L. Ed. 2d 56 (1988),* and *Barnard v. Thorstenn, 489 U.S. 546, 109 S. Ct. 1294, 103 L. Ed. 2d 559 (1989).* However, in all three cases, the Court held that states could not require some form of residency as a qualification for admission to the bar. The Court did not address whether the Privileges and Immunities Clause permitted states to accord nonresident lawyers limited privileges to practice law that it denied residents.

The better view is that these cases do not imply that the Privileges and Immunities Clause bars states from granting nonresident lawyers limited privileges denied to residents. In Barnard, the Court expressly affirmed that the Clause prevents discrimination against nonresidents. See *109 S. Ct. at 1299.* Plaintiffs do not cite any cases in which the Clause has been held to prevent discrimination in favor of nonresident lawyers. Moreover, in other contexts, the Court has concluded that the Constitution does not require a state bar to admit lawyers simply because they have been admitted to another state bar. See *Leis v. Flynt, 439 U.S. 438, 99 S. Ct. 698, 701, 58 L. Ed. 2d 717 (1979).* For this reason, Plaintiffs' challenge based on the Privileges and Immunities Clause is meritless.

Morissette, slip op. at 11 (C.D. Cal. Nov. 16, 1992).

Plaintiffs provide no compelling reason to reject the district court's holding in Morissette. As such, consistent with Judge Davies' holding in Morissette, the Court holds that plaintiffs have failed to state a claim under the Privileges and Immunities Clauses of Article IV and the California Constitution and GRANTS defendants' motion to dismiss these claims.

(c) Commerce Clause

Plaintiffs argue that Rule 983 violates the Commerce Clause because it is a protectionist measure designed to limit competition between in-state and out-of-state lawyers. Plaintiffs concede in their complaint the "mutually reinforcing relationship between the privileges and immunities Clause and the Commerce Clause." Complaint P 43.

For the same reasons as the Court has rejected plaintiffs' Privileges and Immunities argument, it also rejects plaintiffs' Commerce Clause argument. In particular, when looking at the same alleged discrimination under the different clauses, the same standard applies. See *Giannini v. Real, 911 F.2d 354, 358 (9th Cir. 1990)* (citing *Sestric v. Clark, 765 F.2d 655, 664 (7th Cir. 1985)*, cert. denied, *474 U.S. 1086, 88 L. Ed. 2d 901, 106 S. Ct. 862 (1986))*; Morissette, slip. op. at 13 (C.D. Cal. May 26, 1993). In sum, plaintiffs have failed to state a claim under the Commerce Clause. Defendants' motion to dismiss this claim is therefore GRANTED.

(d) First Amendment

Plaintiffs argue that Rule 983 violates their First Amendment rights to speech, assembly, association and petition for redress of grievances. Plaintiffs largely repeat the arguments made in connection with their Equal Protection claims that Rule 983 violates the First Amendment. For the reasons set forth above, the Court rejects those arguments. Additionally, plaintiffs argue that Rule 983 constitutes an impermissible prior restraint because it directly regulates and censors plaintiffs' speech. As stated above, simply because Rule 983 regulates the practice of law in California does not mean that Rule 983 implicates the First Amendment. Defendants' motion to dismiss this claim is therefore GRANTED.

(e) Due Process

Finally, plaintiffs argue that Rule 983 violates their due process rights under the United States and California Constitutions by presuming that out-of-state attorneys not licensed in California are more "fit" to practice law than resident attorneys who are not licensed by the California State Bar. Plaintiffs argue that the Court should reexamine its holding in McKenzie v. George, C 97-0403 SI in light of "numerous" cases cited by plaintiffs which, according to plaintiffs, hold that there is a fundamental right to practice law. Plaintiffs argue that based upon a review of these cases, "there can be no doubt" that the Supreme Court's holding in *Leis v. Flynt, 439 U.S. 438, 99 S. Ct. 698, 58 L. Ed. 2d 717 (1979),* has been overruled sub silentio. This argument is directly contradicted by the Supreme Court's express recognition in Piper that "Our conclusion that Rule 42 violates the Privileges and Immunities Clause is consistent with Leis v. Flynt." *470 U.S. at 283 n.16, 105 S. Ct. at 1278 n.16.* Moreover, as discussed earlier, plaintiffs' reliance on *United States v. Ries, 100 F.3d 1469 (9th Cir. 1996)* and similar cases is misplaced, as these cases hold that a criminal defendant's Sixth Amendment right to counsel includes the right to have out-of-state counsel appointed pro hac vice, but do not hold that a lawyer has a fundamental right to pro hac vice admission. See, e.g., *Fuller v. Diesslin, 868 F.2d 604, 606* (3d Cir.), cert. denied, *Perretti v. Fuller, 493 U.S. 873, 110 S. Ct. 203 (1989); Panzardi v. Alvarez, 816 F.2d 813, 816 (1st Cir. 1987).*

Plaintiffs' reliance on *Kirkland v. National Mortgage Network, 884 F.2d 1367, 1371 (11th Cir. 1989)* is similarly incorrect, as Kirkland held that once admitted pro hac vice, a lawyer enjoys the same procedural due process rights as other attorneys before being disqualified from a matter. Contrary to plaintiffs' contention that Kirkland provides support for finding that Leis has been overruled sub silentio, the Kirkland court recognized that under Leis, "no Fourteenth Amendment property interest is implicated by a state court's refusal to

admit an attorney pro hac vice." *Kirkland, 884 F.2d at 1371.* Thus, plaintiffs' argument that Rule 983's "automatic disqualification provisions" constitute "glaring federal due process violations" is unavailing. Plaintiffs' Motion for Summary Judgment, 29:10-12.

Plaintiffs argue that the due process clause contained in the California Constitution provides even greater protection than its federal counterpart in that California courts have ruled that an individual's "dignity" must be considered in assessing his or her right to due process. See *People v. Ramirez, 25 Cal. 3d 260, 267, 158 Cal. Rptr. 316, 599 P.2d 622 (1979).* In People v. Ramirez, the California Supreme Court held that "when an individual is subjected to deprivatory governmental action, he always has a due process liberty interest both in fair and unprejudiced decision-making and in being treated with respect and dignity." *Id. at 268.* While the California Supreme Court may have recognized an additional factor to consider in assessing what due process requires, it is nonetheless clear that due process is not implicated unless an individual is "subjected to deprivatory governmental action." The instant plaintiffs have not suffered any deprivation because they do not have a right to practice pro hac vice.

Plaintiffs' argument is premised on the false contention that the right to appear pro hac vice is a fundamental right, triggering heightened review under the Due Process Clause. As stated above, there is no fundamental right to appear pro hac vice. See *Leis, 439 U.S. at 443, 99 S. Ct. at 701* Ultimately, plaintiffs provide no persuasive rationale for subjecting Rule 983 to exacting scrutiny under the Due Process Clause or for determining that Rule 983's presumption in favor of out-of-state attorneys is irrational. The Court therefore GRANTS defendants' motion to dismiss plaintiffs' due process claims.

(4) Leave to Amend

The Court grants defendants' motions to dismiss without leave to amend because the Court determines that plaintiffs will be unable to cure the substantial defects in their claims by amendment.

2. Plaintiffs' Motion for Summary Judgment

In light of the Court's findings set out above, the Court hereby DENIES plaintiffs' motion for summary judgment.

3. Defendants' Motions for Sanctions

Defendants' motions for sanctions against plaintiffs and their counsel, Giannini, were originally scheduled for argument on July 24, 1998. At the request of Giannini and his lawyer, Jeffrey L. Russell, the Court continued the hearing on defendants' motions for sanctions until September 4, 1998 in order to allow plaintiffs and Giannini additional time to oppose the motions. By order dated August 4, 1998, the Court directed the parties to focus their briefing on the pre-filing sanctions requested by the State Bar defendants. Defendants filed supplemental papers on August 21, and plaintiffs filed supplemental papers with the Court on August 28.

A. Legal Standard

Rule 11 provides in relevant part:

> Every pleading, motion, and other paper . . . [filed with the Court] shall be signed by at least one attorney of record [or the party. . . .]
>
> The signature of an attorney or party constitutes a certificate by the signer that the [paper . . .] is [1] well grounded in fact and is [2] warranted by existing law or a good faith argument for the extension . . . of existing law

> . . . and [3] that it is not interposed for any improper purpose. . . .
>
> If a . . . paper is signed in violation of this rule, the court . . . shall impose . . . an appropriate sanction . . . .

The test imposed by Rule 11 is an objective one. See *Zaldivar v. City of Los Angeles, 780 F.2d 823, 831 (9th Cir. 1986).* The certification requirements of Rule 11 are violated "if the paper filed . . . is frivolous, legally unreasonable or without factual foundation, even though . . . not filed in subjective bad faith." Id.

Under this objective, analytic approach to Rule 11, a cause of action is not "warranted by law" where no "plausible, good faith argument can be made by a competent attorney" in support of the proposition asserted. *Id., at 829, 833.* Under the objective approach to Rule 11, a finding of improper purpose can be determined following the Court's own review of the facts and the law: Where there is no legal or factual basis for a claim, improper purpose may be deduced. See *Huettig & Schromm, Inc. v. Landscape Contractors Council, 790 F.2d 1421, 1427 (9th Cir. 1986).* Similarly, where there is a basis for a claim in law and fact, the "subjective intent of the pleader . . . is of no moment." *Zaldivar, 780 F.2d at 830.* The current version of Rule 11 "subject[s] litigants to potential sanctions for insisting upon a position after it is no longer tenable. . . ." Advisory Committee Notes on Rule 11. See also *Ridder v. City of Springfield, 109 F.3d 288 (6th Cir.1997).*

When a court imposes sanctions, the type and amount of the sanctions remain largely within the discretion of the Court. See *Hudson v. Moore Business Forms, Inc., 898 F.2d 684, 686-87 (9th Cir. 1990); Golden Eagle Distributing Corp., 801 F.2d 1531, 1536, 1540.*

B. Analysis

All defendants have filed motions for sanctions against plaintiffs and plaintiffs' attorney, Giannini, on the grounds that the instant lawsuit is legally frivolous and was brought with an improper purpose.[13] Defendants argue that the long history of Giannini's litigation "proves without a doubt" that Giannini's complaint is frivolous and that he was aware at the time of filing this current complaint that several courts, including this Court, had dismissed the identical arguments raised in this case. Defendants contend that plaintiffs' and Giannini's improper purpose is evidenced by plaintiffs' acknowledgment that they filed the instant case to relitigate the issues presented in McKenzie v. George, C 97-0403 SI.

Defendants argue that this case is similar to the situation presented in *Roundtree v. United States, 40 F.3d 1036 (9th Cir. 1994).* In Roundtree, the Ninth Circuit affirmed sanctions against an attorney who filed numerous lawsuits with different plaintiffs, alleging in each case that the Federal Aviation Administration did not have authority to suspend a pilot's license. In reviewing the award of sanctions, the Ninth Circuit held,

> To be sure, this is not a case where the same plaintiff has sued over and over again, but that is a distinction without a difference. It is of an almost worse stripe because a lawyer has been able to beguile plaintiff after plaintiff into coming along with him as he rides his hobbyhorse against the government. We cannot say that the district court abused its discretion when it imposed sanctions upon Smith.

Id. at 1040. The court noted that in addition to Roundtree, Smith had previously filed six different lawsuits with different plaintiffs in five judicial circuits. "Each time he has induced a plaintiff and forced the government to go through

essentially the same expensive exercise; each time he has forced the courts to adjudicate essentially the same issues." Id. In the instant case, defendants argue, the argument for sanctions against Giannini is even stronger, as Giannini himself has acted as a plaintiff in a number of his cases.

Defendants seek sanctions in the form of an order enjoining Giannini from filing any further actions or papers, either as an attorney or party, in any court regarding admission to and the regulation of the practice of law in the State of California without first obtaining leave of the chief or presiding judge of that court. Defendants argue a pre-filing order is necessary because monetary sanctions are insufficient to deter Giannini's continued pursuit of frivolous actions. In Morissette v. Yu, the district court sanctioned Giannini in the amount of $ 2,000.00. These sanctions were later reduced by a different judge to requiring Giannini to perform 200 hours of community service and making a written apology to Judge Davies, the district judge in Morissette. On appeal, the Ninth Circuit sanctioned Giannini and assessed double costs. Defendants argue that despite these sanctions, Giannini had continued his course of repeatedly litigating the same issue, always without success.[14]

Defendants argue that this Court has the authority to impose a pre-filing sanction on Giannini pursuant to Civil Local Rule 11-7. That rule provides in relevant part,

> If an attorney practicing before this court engages in conduct which may warrant discipline or other sanctions, the court or any judge may initiate proceedings for contempt under Title 18 of the United States Code and Federal Rule of Criminal Procedure 42. After reasonable notice and an opportunity to show cause to the contrary, the court may take any

> other appropriate disciplinary action against the attorney. . . .

Defendants contend that this Court's August 4, 1998 order constituted reasonable notice to Giannini that the Court is considering entering a pre-filing order against him and offered an opportunity to show cause to the contrary.

In addition to the Court's authority under Local Rule 11, the Ninth Circuit has recognized statutory authority to issue pre-filing injunctions like the one requested by defendants. In *Moy v. United States, 906 F.2d 467 (9th Cir. 1990),* the court held that courts may issue pre-filing injunctions pursuant to *28 U.S.C. § 1651* against litigants who have filed numerous, patently meritless lawsuits. See also *Wood v. Santa Barbara Chamber of Commerce, Inc., 705 F.2d 1515, 1524 (9th Cir. 1983)* ("district courts do have the power to reinforce the effects of [collateral estoppel and res judicata] by issuing an injunction against repetitive litigation"), cert. denied, *465 U.S. 1081, 104 S. Ct. 1446, 79 L. Ed. 2d 765 (1984).*

Plaintiffs' opposition to defendants' motions for sanctions consists of a declaration filed by Giannini's counsel, Jeffrey Russell, [15] as well as an untimely opposition filed August 28, 1998. In the interest of allowing plaintiffs and Giannini their full opportunity to be heard on the matter, the Court will consider plaintiffs' untimely opposition. Russell states in his declaration that based upon his review of the pleadings, court orders, and other related documents in McKenzie v. George, C 97-0403 SI and this case, it is Russell's opinion that defendants' motions for sanctions are "aimed to censor and retaliate" against Giannini, and that this lawsuit is not frivolous. Russell states that it is his belief that the Ninth Circuit has never adjudicated whether Rule 983 is lawful. Russell states it is his belief that the instant case is "necessary and not frivolous" for three reasons: (1) "changes in the law" since the Court decided McKenzie v. George; (2) the plaintiffs in that case "were denied their full and fair

opportunity to appeal as a matter of right" because they did not receive the Court's November 5, 1997 order and judgment; and (3) this Court did not address a number of arguments and case law presented by the plaintiffs in McKenzie v. George in the plaintiffs' numerous motions to vacate the July 22, 1997 order.

In the opposition filed on August 28, 1998, plaintiffs argue that defendants are themselves to blame for the instant lawsuit because they did not provide timely notice to Giannini of this Court's November 5, 1997 judgment. Plaintiffs also repeat many of their substantive arguments presented in their counter motion for summary judgment, including citing Governor Wilson's criticism of the State Bar and "changed circumstances" such as the invalidation of several unrelated California Rules of Court. Plaintiffs also contend that the constitutionality of Rule 983 has never been ruled upon in a published opinion and that therefore the instant action is not frivolous.

The Court rejects plaintiffs' arguments and finds that there is abundant evidence that this case is legally frivolous and was filed for an improper purpose. At a minimum, plaintiffs' Privileges and Immunities claims have been rejected not only by this Court in McKenzie v. George, but the court in Morissette v. Yu. As discussed earlier in connection with defendants' motions to dismiss, neither the alleged "changes in the law" nor the case law that this Court allegedly ignored in McKenzie v. George change the fact that plaintiffs' claims are without merit and that plaintiffs cannot state a claim. In fact, plaintiffs' arguments regarding "changed circumstances" are themselves frivolous: for example, Governor Wilson's criticism of the State Bar has no bearing on the constitutionality of Rule 983. The fact that plaintiffs could not appeal the judgment in McKenzie v. George due to errors by Giannini does not allow plaintiffs to file two more lawsuits raising virtually identical claims on virtually identical grounds.

For the foregoing reasons, the Court concludes that it is appropriate to award sanctions against Giannini in the form of a pre-filing requirement. The Court declines to award monetary sanctions, finding that such sanctions have not deterred Giannini in the past. The Court hereby ORDERS as follows:

Joseph R. Giannini is hereby ENJOINED from filing any further actions, either as an attorney or a party, in the United States District Court for the Northern District of California, regarding admission to and the regulation of the practice of law in the State of California without first obtaining leave of the Chief Judge of this court. If Giannini wishes to file further actions regarding admission to and the regulation of practice of law in California, Giannini must attach a copy of this order to his application for leave to file such actions and supply a declaration supporting the application stating: (1) that the matters asserted in the new action have not previously been raised by him, as an attorney or a party, and disposed of on the merits by any court, state or federal; (2) that the claims are not frivolous or made in bad faith; and (3) that Giannini has conducted a reasonable investigation of the facts and certifies that they are accurate. Failure to comply with any of these conditions shall be sufficient grounds to deny the application or dismiss the action, and any violation of this injunction may be treated as contempt of court.

CONCLUSION

For the foregoing reasons, the Court hereby ORDERS as follows:

(1) Defendants' motion to dismiss the complaint is GRANTED WITHOUT LEAVE TO AMEND,

(2) Plaintiffs' motion for summary judgment is DENIED,

(3) Defendants' motions for sanctions are GRANTED, to the extent that a pre-filing requirement is imposed on Joseph Giannini as set out above..

IT IS SO ORDERED.

Dated: March 9, 1999

SUSAN ILLSTON

United States District Judge

JUDGMENT

In accordance with the Order: (1) Granting Defendants' Motions to Dismiss without Leave to Amend; (2) Denying Plaintiffs' Motion for Summary Judgment; and (3) Granting Defendants' Motions for Sanctions by Imposing a Pre-Filing Requirement, dated March 9, 1999, the Court hereby enters judgment against plaintiffs Richard J. Paciulan and William A. Kruse and in favor of defendants Ronald M. George, et al., and the specified Rule 11 sanctions against Joseph Giannini.

IT IS SO ADJUDGED.

Dated: March 9, 1999

SUSAN ILLSTON

United States District Judge

----------Footnotes----------

n1 At the hearing on September 4, 1998, plaintiffs filed a motion to recuse the undersigned from hearing this case. The undersigned thereafter referred the recusal motion for assignment to another district judge, pursuant to Local Rule 3-14. In November, 1998, the motion to recuse was denied by Judge Chesney. Thereafter, in January, 1999, Mr. Giannini as counsel filed a new action, Jeffery Russell v. Procter Hug, et al. (N.D. Cal. C 99-20040), which names various circuit and district judges, including the undersigned, as defendants, and

which challenges this district's rules concerning appointment of attorneys to represent indigent criminal defendants. After filing this new action, plaintiffs filed another motion to recuse the undersigned. The undersigned denied the latter recusal motion by order dated March 8, 1999, again pursuant to Local Rule 3-14.

n2 Rule 983 of the California Rules of Court provides as follows:

A person who is not a member of the State Bar of California but who is a member in good standing of and eligible to practice before the bar of any United States court or of the highest court in any state, territory or insular possession of the United States, and who has been retained to appear in a particular cause pending in a court of this state, may in the discretion of such court be permitted upon written application to appear as counsel pro hac vice, provided that an active member of the State Bar of California is associated as attorney of record. No person is eligible to appear as counsel pro hac vice pursuant to this rule if (1) he is a resident of the State of California, or (2) he is regularly employed in the State of California, or (3) he is regularly engaged in substantial business, professional, or other activities in the State of California. Absent special circumstances, repeated appearances by any person pursuant to this rule shall be a cause for denial of an application.

n3 "Pro hac vice" is defined by Black's Law Dictionary (5th Ed., 1979) as "For this turn; for this one particular occasion. A lawyer may be admitted to practice in a jurisdiction for a particular case only."

n4 Although Giannini is not a member of the California State Bar, he apparently is a member of the Bar of the Northern District of California.

n5 Plaintiffs in this case mistakenly state that the Court's July 22, 1997 order in McKenzie v. George, C 97-0403 SI reversed a previous holding on April 2, 1997 finding that the plaintiffs had stated claims capable of surviving a Rule 12(b)(6) motion. In fact, the Court's April 2, 1997 order only addressed, and rejected, the defendants' arguments (1) that the Eleventh Amendment barred the plaintiffs' lawsuit, and (2) that Giannini could not represent the plaintiffs because he was not a member of the California State Bar. The Court expressly noted that the defendants' motion to dismiss pursuant to Rule 12(b)(6) was pending and would be heard in July 1997.

n6 Plaintiffs and Giannini contend that the Court never reviewed their motion to vacate "on the merits," despite the Court's statement in the October 6, 1997 order that even if the motion had been timely, the Court would have denied the motion because the plaintiffs in McKenzie had not met the requirements for reconsideration as set forth in Civil Local Rule 7-9.

n7 Plaintiffs Monica McKenzie, Roger Lowenstein, Arthur Mintz, and Howard Soben were also plaintiffs in McKenzie v. George, C 97-0403 SI. Plaintiff Jeffrey L. Russell is the attorney currently representing Giannini in connection with defendants' motions for sanctions.

n8 The full quotation is as follows: "A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines. With consistency a great soul has simply nothing to do. . . . Speak what you think today in hard words and tomorrow speak what tomorrow thinks in hard words again, though it contradict everything you said today." Ralph Waldo Emerson, Self-Reliance, Essays: First Series (1841).

n9 Plaintiffs did not submit a substantive opposition to defendants' motions to dismiss, instead incorporating by reference their arguments as set forth in their counter motion for summary judgment.

n10 In McKenzie v. George, this Court rejected the plaintiffs' argument the constitutionally protected privileges and immunities of Art. IV, § 2 are not distinguishable from the privileges and immunities protected by the Fourteenth Amendment: "Plaintiffs fail to cite any authority in support of this contention. Compare U.S. Const. art. IV, § 2 ('The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.') with id., am. XIV, § 1 ('No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States'). See also Laurence Tribe, American Constitutional Law § 7-2, at 548 (2d ed. 1988) ('State citizenship carries with it, by virtue of article IV, the right to nondiscriminatory treatment within each state of the fundamental rights of citizens of all the states. The protection is broad, in the sense that numerous rights have been held to be fundamental rights of state citizenship . . . [In contrast,] the Supreme Court has greatly narrowed the rights that attach to national citizenship [under the Privileges and Immunities Clause of the Fourteenth Amendment] so that instances of valid privileges or immunities must be but few.'); Ronald Rotunda & John Nowak, Treatise on Constitutional Law § 14.3, at 351 (2d ed. 1992) ('Despite the essentially similar wording of the two provisions they have widely differing applications.')." Order Granting Intervenors' Motion to Dismiss at 11:16-28. [**36]

n11 The other case cited by plaintiffs, *Frazier v. Heebe, 482 U.S. 641, 107 S. Ct. 2607, 96 L. Ed. 2d 557 (1987)*, was decided by the Supreme Court pursuant to its supervisory

authority over the federal courts under *28 U.S.C. § § 1654,* 2071.

n12 The Court notes that plaintiffs' Complaint does not allege a Privileges and Immunities Claim under the California Constitution. However, plaintiffs' counter motion for summary judgment discusses this claim as if it were contained in the complaint. In the interest of allowing plaintiffs a full opportunity to litigate their claims, the Court will review this claim.

n13 The State Bar defendants seek sanctions in the form of a pre-filing order against plaintiffs Paciulan and Kruse, and their attorney, Giannini. The Supreme Court defendants join in the motion filed by the State Bar defendants, but clarify that they seek sanctions only against Giannini. The Supreme Court defendants have also filed a separate motion for monetary sanctions against Giannini.

n14 The Supreme Court defendants have also moved for monetary sanctions in the amount of $ 10,000.00 against Giannini. The Supreme Court defendants argue the Court should impose monetary sanctions in addition to a pre-filing order. Defendants argue that significant monetary sanctions are required to deter Giannini because Giannini has not been deterred by more modest sanctions.

n15 It appears from the allegations in Russell v. Hug, C-99-20040, that Mr. Russell is not a member of the State Bar of California, although he asserts that he is admitted to practice in the Northern District of California and in various other jurisdictions. Complaint, at 4:15-23.

Relevant Constitutional Provisions and Regulation Involved

The First Amendment to the United States Constitution provides that,

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the Government for a redress of grievances.

The 14th Amendment to the United States Constitution provides that,

> All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

California Senate Bill 1782, provides,

CHAPTER 247

FILED WITH SECRETARY OF STATE AUGUST 25, 2000

APPROVED BY GOVERNOR AUGUST 24, 2000

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. It is the intent of the Legislature that the Supreme Court of California should adopt rules permitting the admission to the practice of law in California of an attorney who is licensed in another state and who has not passed the California State Bar examination, if the state in which the attorney is licensed to practice affords the same opportunity to licensed attorneys from California. The Legislature also recognizes that the question of reciprocal admission is a complex one, and it, therefore, requests that the Supreme Court appoint a task force to study and make recommendations regarding whether and under what circumstances, attorneys who are licensed to practice law in other states and who have not passed the California State Bar examination may be permitted to practice law in California. The task force study should consider all of the following factors:

(a) Years of practice in other states.

(b) Admission to practice law in another state.

(c) Specialization of the attorney's practice in another state.

(d) The attorney's intended scope of practice in California.

(e) The admission requirements in the state or states in which the attorney has been licensed to practice.

(f) Reciprocity with and comity with other states.

(g) Moral character requirements.

(h) Disciplinary implications.

(i) Consumer protection.

California Rule of Court 983. Counsel *pro hac vic,* provides,

> (a) [Eligibility.] A person who is not a member of the State Bar of California but who is a member in good standing of and eligible to practice before the bar of any United States court or of the highest court in any state, territory or insular possession of the United States, and who has been retained to appear in a particular cause pending in a court of this state, may in the discretion of such court be permitted upon written application to appear as counsel pro hac vice, provided that

an active member of the State Bar of California is associated as attorney of record. No person is eligible to appear as counsel pro hac vice pursuant to this rule if (1) he is a resident of the State of California, or (2) he is regularly employed in the State of California, or (3) he is regularly engaged in substantial business, professional, or other activities in the State of California. Absent special circumstances, repeated appearances by any person pursuant to this rule shall be a cause for denial of an application.

(b) Application; Notice of Hearing] A person desiring to appear as counsel pro hac vice in a superior, municipal, or justice court shall file with the court a verified application together with proof of service by mail in accordance with section 1013a Civ. Proc. of the Code of Civil Procedure of a copy of the application and of the notice of hearing of the application upon all parties who have appeared in the cause and upon the State Bar of California at its San Francisco office. The notice of hearing shall be given at the time prescribed in section 1005 Civ. Proc. of the Code of Civil Procedure unless the court has prescribed a shorter period.
An application to appear as counsel pro hac

vice in the Supreme Court or a Court of Appeal shall be made as provided in rule 41, with proof of service upon all parties who have appeared in the cause and upon the State Bar of California at its San Francisco office.

The application shall state:

(1) the applicant's residence and office address;

(2) the courts to which the applicant has been admitted to practice and the dates of admission;

(3) that the applicant is a member in good standing in those courts;

(4) that the applicant is not currently suspended or disbarred in any court;

(5) the title of court and cause in which the applicant has filed an application to appear as counsel pro hac vice in this state in the preceding two years, the date of each application, and whether or not it was granted; and

(6) the name, address, and telephone number of the active member of the State Bar of California who is attorney of record.

(c) [Fee] An applicant for permission to appear as counsel pro hac vice pursuant to this rule shall pay a reasonable fee not exceeding $50 to the State Bar of California with the copy of the application and the notice of hearing that is served upon the State Bar. The

amount of the fee shall be fixed by the Board of Governors of the State Bar of California (1) to defray the expenses of administering the provisions of this rule which are applicable to the State Bar and the incidental consequences resulting from such provisions, and (2) partially to defray the expenses of administering the board's other responsibilities to enforce the provisions of the State Bar Act relating to the competent delivery of legal services and the incidental consequences resulting therefrom.

(d) [Contempt and other court sanctions; discipline] A person permitted to appear as counsel pro hac vice pursuant to this rule shall be subject to the jurisdiction of the courts of this state with respect to the law of this state governing the conduct of attorneys to the same extent as a member of the State Bar of California. He shall familiarize himself and comply with the standards of professional conduct required of members of the State Bar of California and shall be subject to the disciplinary jurisdiction of the State Bar with respect to any of his acts occurring in the course of such appearance. Article 5, Chapter 4, Division III of the California Business and Professions Code and the Rules of Procedure of the State Bar shall govern in any investigation or proceeding

conducted by the State Bar under this rule.

(e) This rule does not preclude the Supreme Court or a Court of Appeal from permitting argument in a particular case from a person who is not a member of the State Bar, but who is licensed to practice in another jurisdiction and who possesses special expertise in the particular field affected by the proceeding.

CA Rule of Court 76.6, provides

RULE 76.6 QUALIFICATIONS OF COUNSEL IN DEATH PENALTY APPEALS AND HABEAS CORPUS PROCEEDINGS

(a) [Purpose] The purpose of this rule is to define minimum qualifications for attorneys appointed to represent persons in the Supreme Court in death penalty appeals and habeas corpus proceedings related to sentences of death. An attorney is not entitled to appointment simply because the minimum qualifications are met.

(b) [General qualifications] The Supreme Court shall appoint an attorney only if, after reviewing the attorney's experience, writing samples, references, and evaluations as set forth in subdivisions (d) through (f), the court determines

that the attorney has demonstrated the commitment, knowledge, and skills necessary to competently represent the defendant. An attorney appointed under this rule must be willing to cooperate with an assisting counsel or entity as may be designated by the court.

(c) [Definitions] The following definitions apply:

(1) "Appointed counsel" means an attorney appointed by the Supreme Court to represent a person in a death penalty appeal or death penalty related habeas corpus proceedings in the Supreme Court. Appointed counsel may be either lead counsel or associate counsel.

(2) "Lead counsel" means an appointed attorney or an attorney in the Office of the State Public Defender, the California Habeas Resource Center, or the California Appellate Project, who is responsible for the overall conduct of the case and for supervising the work of associate and supervised counsel. Whenever more than one attorney is appointed to represent a defendant jointly in a death penalty appeal, in death penalty related habeas corpus proceedings in the Supreme Court, or in both classes of proceedings together, one such attorney shall be designated as lead counsel.

(3) "Associate counsel" means an attorney appointed by the Supreme Court who does not have the primary responsibility for the case. Associate counsel must meet the same minimum qualifications as lead counsel.

(4) "Supervised counsel" means an attorney who works under the immediate supervision and direction of lead or associate counsel, but is not appointed by the Supreme Court. Supervised counsel must be an active member of the State Bar of California.

(5) "Assisting counsel or entity" means an attorney or entity designated by the Supreme Court to provide outside consultation and resource assistance to appointed counsel. Entities that may be designated in this capacity include, as appropriate, the Office of the State Public Defender, the California Habeas Resource Center, and the California Appellate Project.

(d) [Qualifications for appointed appellate counsel] An attorney appointed to represent a person in the Supreme Court in a death penalty appeal, as either lead or associate counsel, must have at least the following qualifications and experience:

(1) Active practice of law in California for at least four years;

(2) Either:

(A) Counsel of record for a defendant in seven completed felony appeals, including one murder; or

(B) Counsel of record for a defendant in five completed felony appeals and supervised counsel for a defendant in two death penalty appeals in which the opening brief has been filed. Service as supervised counsel in a death penalty appeal shall apply toward the minimum qualification pescribed in this subdivision (d)(2)(B) only if lead or associate counsel in that appeal attests that the supervised attorney has performed a significant portion of work on the case and recommends the attorney for appointment;

(3) Familiarity with the practices and procedures of the Supreme Court, including those specifically related to death penalty appeals;

(4) Within three years before appointment, completion of at least nine hours of Supreme Court-approved appellate criminal defense

training, continuing education, or course of study, at least six hours of which involve death penalty appeals. If the Supreme Court previously has appointed counsel to represent a defendant in a death penalty appeal or a related habeas corpus proceeding, and counsel has provided active representation within three years prior to the request for a new appointment, the court, upon review of counsel's previous work, may find that such representation constitutes compliance with this training requirement; and

(5) Proficiency in issue identification, research, analysis, writing, and advocacy, taking into consideration:

(A) Two writing samples, ordinarily appellate briefs, written by the attorney and involving analysis of complex legal issues;

(B) If the attorney has been appointed previously in a death penalty appeal or death penalty related habeas corpus proceeding in the Supreme Court, the evaluation of the assisting counsel or entity in that proceeding;

(C) Recommendations from two attorneys familiar with the attorney's qualifications and performance; and

(D) If the attorney is on a panel of attorneys eligible for appointments to represent indigent appellants in the Court of Appeal, the evaluation of the administrator responsible for those appointments.

(e) [Qualifications for appointed habeas corpus counsel] An attorney appointed to represent a person in the Supreme Court in death penalty related habeas corpus proceedings, as either lead or associate counsel, must have at least the following qualifications and experience:

(1) Active practice of law in California for at least four years;

(2) Either:

(A) Counsel of record for a defendant in five completed felony appeals or writ proceedings, including one murder, and counsel of record for a defendant in three jury trials or three habeas corpus proceedings involving serious felonies; or

(B) Counsel of record for a defendant in five completed felony appeals or writ proceedings and supervised counsel in two Supreme Court death penalty related habeas corpus proceedings in

which the petition has been filed. Service as supervised counsel in a Supreme Court death penalty related habeas corpus proceeding shall apply toward the minimum qualifications described in this subdivision (e)(2)(B) only if lead or associate counsel in that proceeding attests that the attorney has performed a significant portion of work on the case and recommends the attorney for appointment;

(3) Familiarity with the practices and procedures of the California Supreme Court and the federal courts in death penalty habeas corpus proceedings;

(4) Within three years before appointment, completion of at least nine hours of Supreme Court-approved appellate criminal defense or habeas corpus defense training, continuing education, or course of study, at least six hours of which involve death penalty habeas corpus proceedings. If the Supreme Court previously has appointed counsel to represent a defendant in a death penalty appeal or a related habeas corpus proceeding, and counsel has provided active representation within three years prior to the request for a new appointment, the court, upon review of counsel's previous work, may find that such representation constitutes compliance with

this training requirement; and

(5) Proficiency in issue identification, research, analysis, writing, investigation, and advocacy, taking into consideration:

(A) Three writing samples, ordinarily two appellate briefs and one habeas corpus petition, written by the attorney and involving analysis of complex legal issues;

(B) If the attorney has been appointed previously in a death penalty appeal or death penalty related habeas corpus proceeding in the Supreme Court, the evaluation of the assisting counsel or entity in that proceeding;

(C) Recommendations from two attorneys familiar with the attorney's qualifications and performance; and

(D) If the attorney is on a panel of attorneys eligible for appointments to represent indigent appellants in the Court of Appeal, the evaluation of the administrator responsible for those appointments.

(f) [Alternative qualifications] The Supreme Court may appoint an attorney who does not meet

the requirements of subdivisions (d)(1) and (d)(2) or (e)(1) and (e)(2) of this rule if the attorney has the qualifications described in subdivisions (d)(3) through (d)(5) or (e)(3) through (e)(5) and:

(1) The court finds that the attorney has extensive experience in another jurisdiction or a different type of practice (such as civil trials or appeals, academic work, or work for a court or prosecutor) for at least four years, such that the attorney has substantially equivalent experience in complex cases as an attorney qualified under subdivision (d) or (e);

(2) Ongoing consultation is available to the attorney rom an assisting counsel or entity designated by the court; and

(3) Within two years before appointment, the attorney has completed at least 18 hours of Supreme Court-approved appellate criminal defense or habeas corpus defense training, continuing education, or course of study, at least nine hours of which involve death penalty appellate or habeas corpus proceedings. The Supreme Court shall determine in each case whether the training, education, or course of study completed by a particular attorney satisfies the requirements of this subdivision in light of his or

her individual background and experience. If the Supreme Court previously has appointed counsel to represent a defendant in a death penalty appeal or a related habeas corpus proceeding, and counsel has provided active representation within three years prior to the request for a new appointment, the court, upon review of counsel's previous work, may find that such representation constitutes compliance with this training requirement.

(g) [Attorneys without trial experience] If an attorney appointed under either subdivision (e) or subdivision (f) to represent a defendant in death penalty related habeas corpus proceedings in the Supreme Court does not have experience in conducting trials or evidentiary hearings, the attorney must associate an attorney who has such experience if an evidentiary hearing is ordered in the habeas corpus proceeding.

(h) [Use of supervised counsel] An attorney who does not meet the qualifications described in subdivisions (d), (e), or (f) may assist lead or associate counsel, but must work under the immediate supervision and direction of lead or associate counsel.

(i) [Dual appointment] An attorney appointed to represent a defendant in both a death penalty

appeal and death penalty related habeas corpus proceedings in the Supreme Court must meet the minimum qualifications of both subdivisions (d) and (e), or of subdivision (f). Notwithstanding the foregoing, two attorneys together may be eligible for appointment to represent a defendant jointly in both a death penalty appeal and death penalty related habeas corpus proceedings in the Supreme Court if the Supreme Court finds that their qualifications in the aggregate satisfy the provisions of both subdivisions (d) and (e), or of subdivision (f).

(j) [Designated entities as appointed counsel] Notwithstanding any other provision of this rule, the State Public Defender is qualified and eligible to serve as appointed counsel in death penalty appeals, the California Habeas Resource Center is qualified and eligible to serve as appointed counsel in death penalty related habeas corpus proceedings in the Supreme Court, and the California Appellate Project is qualified and eligible to serve as appointed counsel in both classes of proceedings. When serving as appointed counsel in a death penalty appeal, the State Public Defender or the California Appellate Project shall not assign any attorney as lead counsel in the appeal unless it finds the attorney has the qualifications described in subdivisions

(d)(1) through (d)(5) or the Supreme Court finds the attorney to qualify under subdivision (f). When serving as appointed counsel in a death penalty related habeas corpus proceeding in the Supreme Court, the California Habeas Resource Center or the California Appellate Project shall not assign any attorney as lead counsel in the proceeding unless it finds the attorney has the qualifications described in subdivisions (e)(1) through (e)(5) or the Supreme Court finds the attorney to qualify under subdivision (f).

(k) [Attorney appointed by federal court] Notwithstanding any other provision of this rule, the Supreme Court may appoint an attorney who is under appointment by a federal court in a death penalty related habeas corpus proceeding for the purpose of exhausting state remedies in the Supreme Court and for all subsequent state proceedings in that case, if the Supreme Court finds the attorney has the commitment, proficiency and knowledge necessary to represent the defendant competently in state proceedings.

Adopted; eff. Feb. 27, 1998. As amended; eff. April 15, 1998.

RULE 983.2. CERTIFIED LAW STUDENTS

(a) [Definition] A certified law student is a law student who has a currently effective certificate of registration as a certified law student from the State Bar.

(b) [State Bar certified law student program] The State Bar shall establish and administer a program for registering law students under rules adopted by the Board of Governors of the State Bar.

(c) [Eligibility for certification] To be eligible to become a certified law student, an applicant must:

(1) Have successfully completed one full year of studies (minimum of 270 hours) at a law school accredited by the American Bar Association or the State Bar of California, or both, or have passed the first year law students' examination;

(2) Have been accepted into, and be enrolled in, the second, third, or fourth year of law school in

good academic standing or have graduated from law school, subject to the time period limitations set forth in the rules adopted by the Board of Governors of the State Bar; and

(3) Have either successfully completed or be currently enrolled in and attending academic courses in evidence and civil procedure.

(d) [Permitted activities] Subject to all applicable rules, regulations, and statutes, a certified law student may:

(1) Negotiate for and on behalf of the client subject to final approval thereof by the supervising attorney and/or give legal advice to the client, provided that the certified law student:

(i) Obtains the approval of the supervising attorney

to engage in the activities;

(ii) Obtains the approval of the supervising attorney regarding the legal advice to be given or plan of negotiation to be undertaken by the certified law student; and (iii) Performs the activities under the general supervision of the supervising attorney;

(2) Appear on behalf of the client in depositions, provided that the certified law student:

(i) Obtains the approval of the supervising attorney to engage in the activity;

(ii) Performs the activity under the direct and mmediate supervision and in the personal presence of the supervising attorney (or, exclusively in

the case of government agencies, any deputy, assistant, or other staff attorney authorized and designated by the supervising attorney); and

(iii) Obtains a signed consent form from the client on whose behalf the certified law student acts (or, exclusively in the case of government agencies, from the chief counsel or prosecuting attorney) approving the performance of such acts by such certified law student or generally by any certified law student;

(3) Appear on behalf of the client in any public trial, hearing, arbitration, or proceeding, or before any arbitrator, court, public agency, referee, magistrate, commissioner, or hearing officer, to the extent approved by such arbitrator, court, public agency, referee, magistrate, commissioner, or hearing officer, provided that the certified law student:

(i) Obtains the approval of the supervising attorney to engage in the activity;

(ii) Performs the activity under the direct and immediate supervision and in the personal presence of the supervising attorney (or, exclusively in the case of government agencies, any deputy, assistant, or other staff attorney authorized and designated by the supervising attorney);

(iii) Obtains a signed consent form from the client on whose behalf the certified law student acts (or, exclusively in the case of government agencies, from the chief counsel or prosecuting attorney)

approving the performance of such acts by such certified law student or generally by any certified law student; and

(iv) As a condition to such appearance, either first presents, or have previously presented, a copy of the consent form to the arbitrator, court, public agency, referee, magistrate, commissioner, or hearing officer, or files a copy of the consent form in the court case file; and

(4) Appear on behalf of a government agency in the prosecution of criminal actions classified as infractions or other such minor criminal offenses with a maximum penalty or a fine equal to the maximum

fine for infractions in California, including any public

trial:

(i) Subject to approval by the court, commissioner, referee, hearing officer, or magistrate presiding at such public trial; and

(ii) Without the personal appearance of the supervising attorney or any deputy, assistant, or other staff attorney authorized and designated by the supervising attorney, but only if the supervising attorney or the designated attorney has approved in writing the performance of such acts by the certified law student and is immediately available to attend the proceeding.

(e) [Failure to comply with program] A certified law student who fails to comply with the

requirements of the certified law student program of the State Bar shall have his or her certification withdrawn under rules adopted
by the Board of Governors of the State Bar.

(f) [Fee and penalty] The State Bar shall have the authority to set and collect appropriate fees and penalties for this program.

(g) [Inherent power of Supreme Court] Nothing in these rules shall be construed as affecting the power of the Supreme Court to exercise its inherent jurisdiction over the practice of law in California.
Adopted; eff. Dec. 29, 1993.

RULE 988 REGISTERED FOREIGN LEGAL CONSULTANT

(a) [Definition] A "Registered Foreign Legal Consultant"
is a person who
(1) is admitted to practice and is in good standing as an attorney or counselor at law or the equivalent in a foreign country; and

(2) has a currently effective Certificate of Registration as a Registered Foreign Legal Consultant from the State Bar.

(b) [State Bar Registered Foreign Legal Consultant program]
The State Bar shall establish and administer a program for registering foreign attorneys or counselors at law or the equivalent under rules adopted by the Board of Governors of the State Bar.

(c) [Eligibility for Certification] To be eligible to become a Registered Foreign Legal Consultant, an applicant must:

(1) Present satisfactory proof that the applicant has been admitted to practice and has been in good standing as an attorney or counselor at law or the equivalent in a foreign country for at least four of the six years immediately preceding the application, and while so admitted, has actually practiced the law of that country;

(2) Present satisfactory proof that the applicant possesses the good moral character requisite for a person to be licensed as a member of the State Bar of California;

(3) Agree to comply with the provisions of the rules adopted by the Board of Governors of the State Bar relating to security for claims against a Foreign Legal Consultant by his or her cients;

(4) Agree to comply with the provisions of the rules adopted by the Board of Governors of the State Bar relating to maintaining an address of record for State Bar purposes;

(5) Agree to notify the State Bar of any change in his or her status in any jurisdiction where he or shc is admitted to practice or of any discipline with respect to such admission;

(6) Agree to be subject to the jurisdiction of the courts of this state with respect to the laws of the State of California governing the conduct of

attorneys, to the same extent as a member of the State Bar of California;

(7) Agree to become familiar with and comply with the standards of professional conduct required of members of the State Bar of California;

(8) Agree to be subject to the disciplinary jurisdiction of the State Bar of California;

(9) Agree to be subject to the rights and obligations with respect to attorney client privilege, work-product privilege, and other professional privileges, to the same extent as attorneys admitted to practice law in California; and

(10) Agree to comply with the laws of the State of California, the Rules and Regulations of the State ar of California, and these Rules.

(d) [Authority to Practice Law] Subject to all applicable rules, regulations, and statutes, a Registered Foreign Legal Consultant may render legal services in California, except that he or she may not:

(1) Appear for a person other than himself or herself as attorney in any court, or before any magistrate or other judicial officer, in this state or prepare pleadings or any other papers or issue subpoenas in any action or proceeding brought in any court or before any judicial officer;

(2) Prepare any deed, mortgage, assignment, discharge, lease, or any other instrument affecting title to real estate located in the United States;

(3) Prepare any will or trust instrument affecting the disposition on death of any property located in the United States and owned by a resident or any instrument relating to the administration of a decedent's estate in the United States;

(4) Prepare any instrument in respect of the marital relations, rights or duties of a resident of the United States, or the custody or care of the children of a resident; or

(5) Otherwise render professional legal advice on the law of the State of California, any other state of the United States, the District of Columbia, the United States, or of any jurisdiction other than the jurisdiction(s) named in satisfying the requirements of subdivision (c) of this rule, whether rendered incident to preparation of legal instruments or otherwise.

(e) [Failure to comply with program] A Registered Foreign Legal Consultant who fails to comply with the requirements of the Registered Foreign Legal Consultant program of the State Bar shall have her or his certification suspended or revoked under rules adopted by the Board of Governors of the State Bar.

(f) [Fee and penalty] The State Bar shall have the authority to set and collect appropriate fees and penalties for this program.

(g) [Inherent power of Supreme Court] Nothing in these rules shall be construed as affecting the

power of the Supreme Court to exercise its inherent jurisdiction over the practice of law in California. *(Adopted, eff. Dec. 1, 1993.)*

CA Rules: Rules of Prof. Conduct of the State Bar, RULE 1 - 100. RULES OF PROFESSIONAL CONDUCT, IN GENERAL, provides

(B) Definitions.

(1) "Law Firm" means:

(a) two or more lawyers whose activities constitute the practice of law, and who share its profits, expenses, and liabilities; or

(b) a law corporation which employs more than one lawyer; or

(c) a division, department, office, or group within a business entity, which includes more than one lawyer who performs legal services for the business entity; or

(d) a publicly funded entity which employs more than one lawyer to perform legal services.

(2) "Member" means a member of the State Bar of California.

(3) "Lawyer" means a member of the State Bar of California or a person who is admitted in good standing of and eligible to practice before the bar of any United States court or the highest ourt of the District of Columbia or any state, territory, or insular possession of the United States, or is licensed to practice law in, or is admitted in good standing and eligible to practice before the bar of the highest court of, a foreign country or any political subdivision thereof.

(4) "Associate" means an employee or fellow employee who is employed as a lawyer.

(5) "Shareholder" means a shareholder in a professional corporation pursuant to Business and Professions Code section 6160 Bus. & Prof. et seq.

....

(D) Geographic Scope of Rules.

(1) As to members:

These rules shall govern the activities of members in and outside this state, except as members lawfully practicing outside this state may be specifically required by a jurisdiction in which they are practicing to follow rules of professional

conduct different from these rules.

(2) As to lawyers from other jurisdictions who are not members:

These rules shall also govern the activities of lawyers while engaged in the performance of lawyer functions in this state; but nothing contained in these rules shall be deemed to authorize the performance of such functions by such persons in this state except as otherwise permitted by law.

(E) These rules may be cited and referred to as "Rules of Professional Conduct of the State Bar of California."

CALIFORNIA LEGISLATURE
State Capitol
Sacremento, California 95814

October 13, 2000

The Honorable Ronald George
Chief Justice, California Supreme Court
303 Second Street
South Tower
8th Floor
San Francisco, CA 94107

Dear Chief Justice George:

This letter is to help clarify the intent behind SB 1782 (Morrow), which was recently signed by Governor Gray Davis. This bill is our effort to encourage the California Supreme Court to admit out of state of attorneys to practice law in this state without passing the California Bar Exam.

We are of the belief that the California bar Exam is not the best determination of a prospective attorney's ability to represent California consumers. Experienced attorneys from other states would often be better able to learn the nuances of California law in their area of practice than some recent law school graduate.

Additionally, the multi-jurisdictional nature of practice by many attorneys in large corporations make changes to our existing licensing program necessary. While the law needs to adjust to the change in society, so does the administration of those people applying the law.

We recognize that you will need to look at many different factors when making a determination regarding the suitability of an applicant to practice in California. None of us are supporting any one reciprocity plan. However, we stand ready to assist in your evaluation of the current structure.

Sincerely,

Bill Morrow
Vice-Chair, Senate Judiciary Committee

Robert Pacheco
Vice-Chair, Assembly Judiciary Committee